(23,457)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 882.

JOHN F. BAXTER, PLAINTIFF IN ERROR,

vs.

BUCHHOLZ-HILL TRANSPORTATION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals, State of New York.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant.

Cert. Copy.

Remittitur.

Case on Appeal.

Wing, Putnam & Burlingham, Attorneys for Defendant-Appellant, 27 William Street, Borough of Manhattan, New York City.
Armstrong, Brown & Boland, Attorneys for Plaintiff-Respondent, 71 Nassau Street, Borough of Manhattan, New York City

1 Court of Appeals, State of New York.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant.

Statement under Rule 41.

This action was commenced by service of a summons and complaint upon defendant on the 30th day of June, 1909. Plaintiff was represented by Armstrong, Brown and Boland.
Defendant appeared by his attorneys, Wing, Putnam and Burlingham, and served his answer on the 14th day of August, 1909.
The names of the original parties in full are given above. No change of parties, plaintiff or defendant or of their attorneys has taken place.

2 *Notice of Appeal.*

New York Supreme Court, County of Nassau.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

SIRS: Take notice that the defendant in the above entitled action, John F. Baxter, hereby appeals to the Appellate Division of the Supreme Court for the Second Department from the judgment in favor of the plaintiff, Buchholz-Hill Transportation Company, and against said defendant, John F. Baxter, for the sum of $5,767.60 entered and filed in said action in the Office of the County Clerk of the County of

Nassau, the 24th day of March, 1910, and also from the order of this Court in said action denying the motion on behalf of said defendant to set aside the verdict and for a new trial entered and filed in said action in said County Clerk's Office the 7th day of April, 1910, and from each and every part of said order and judgment.

Dated, New York, April 8th, 1910.

Yours, etc.,

WING, PUTNAM & BURLINGHAM,
Attorneys for Defendant.

To Thomas S. Cheshire, Esq., Clerk of Nassau County.
Messrs. Armstrong, Brown & Boland, Attorneys for the Plaintiff.

(Endorsed: Notice of Appeal filed April 9th, 1910.)

3 *Summons.*

Supreme Court of the State of New York.

Trial Desired in the County of Nassau.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 30, 1909.

ARMSTRONG, BROWN & BOLAND,
Plaintiff's Attorneys.

Office and Post Office Address, No. 71 Nassau Street, Borough of Manhattan, New York City.

4 *Complaint.*

Supreme Court.

Trial Desired in Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

Plaintiff, by Armstrong, Brown & Boland, its attorneys complaining of the defendant, alleges:

First. That at all the times hereinafter mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal office and place of business in the County of Nassau, engaged in the business, among other things, of managing a fleet of coal barges in the waters of New York Harbor, and was, at the times hereinafter mentioned the owner of the coal barge "Macy."

Second. That at all such times, the defendant herein was engaged in the business of a wrecker in and about the Harbor of New York, under the name and style of the Baxter Wrecking Company.

Third. That on February 12th, 1907, about 8:30 A. M., the said barge "Macy" was sunk in the North River, about opposite Fort Lee, being completely submerged.

Fourth. That it thereupon became the duty of the plain-
5 tiff, in accordance with the Statutes of the United States, and particularly Chapter 425 of the Laws of 1899, Section 15, Statutes at Large, to immediately mark and place where the said canal boat sank with a buoy or other suitable beacon to prevent said wreck from becoming a menace to navigation.

Fifth. That immediately upon ascertaining the fact that said barge had sunk, and about 9 A. M., on February 12th, 1907, the plaintiff herein engaged the said defendant herein to locate, buoy and raise the said wreck, and that the said Baxter then and there contracted and agreed with the plaintiff that he would promptly and diligently locate and raise the said wreck, and buoy the same as required by statute.

Sixth. That despite the obligations of the said defendant as aforesaid, said defendant did not exercise reasonable diligence in the location and buoying of and raising of said wreck, and did not promptly and diligently locate and buoy said wreck, although the conditions were such that said Baxter could, by the exercise of reasonable diligence, have easily located and buoyed the said wreck.

Seventh. That in consequence of failure to so buoy the said wreck, the tug "Hiawatha" on or about February 14th, 1907, at 3 P. M., ran upon the said wreck, causing the said tug to sink and causing her serious damages.

Eighth. That thereupon and on or about the 12th of December, 1907, a libel was filed in the United States District Court, for the

Southern District of New York, by Frederick A. Egerton and another, owners of the said tug "Hiawatha" against the said
6 canal boat "Macy," praying for the recovery of the damages caused to the said tug "Hiawatha" by reason of said sinking.

Ninth. Plaintiff herein appeared in said cause and made claim to the said boat "Macy," filed an answer therein and petition under the Fifty-ninth Rule in Admiralty of the Supreme Court, to bring in the defendant into said action, to which libel and petition said defendant filed answers, and such proceedings were thereupon had in said court that final decree was entered therein in favor of the said libellant against the boat "Macy," for the sum of Four thousand, nine hundred and forty-five dollars and seventeen cents ($4,945.17), said decree being entered on the 23d day of June, 1908, together with $61.21 costs to the said Baxter, said decree being without prejudice to a new action by the plaintiff herein against Baxter to recover for his said neglect. Said decree was thereafter affirmed by the United States Circuit Court of Appeals for the Second Circuit with costs to the said Baxter, and likewise without prejudice to any new action plaintiffs might desire to bring against said Baxter, all of which decrees have been paid by the plaintiff.

Tenth. That by reason of the premises, the plaintiff has been damaged in the sum of Sixty-five hundred dollars ($6500.00), being the amounts of said decrees that it was compelled to pay as aforesaid, and the said costs, counsel fees and expenses of said litigation, demand for payment of which has been made and refused.

Wherefore plaintiff demands judgment against the defend-
7 ants in the sum of Sixty-five hundred dollars ($6500.00) besides the costs and disbursements of this action.

ARMSTRONG, BROWN & BOLAND.
Attorneys for Plaintiff, Office and Post-office Address, 71 Nassau Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Jas. A. Hill, being duly sworn, deposes and says that he is the President of the Buchholz-Hill Transportation Company, the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAS. A. HILL.

Sworn to before me this 30th day of June, 1909.
[SEAL.] W. C. LAWSON,
Notary Public, No. —, Kings County, New York.

Certificate filed in New York County.

8 *Answer.*

Supreme Court of the State of New York, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

The defendant, by Wing, Putnam & Burlingham, his attorneys, answers the complaint of the plaintiff herein as follows:

I.

For a first defense:

First. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of Article First of the complaint or any of said allegations, except that defendant admits that at the times mentioned in the complaint plaintiff was and still is a corporation duly organized and existing under the laws of New York engaged in the business of operating coal barges in and about New York Harbor.

Second. Admits the allegations of Article Second of the complaint.

Third. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations of Article Third of the complaint or of any of said allegations, except that defendant
9 admits that some time in February, 1907, the barge Macy was in a sunk and submerged condition in the Hudson River in the vicinity of Fort Lee.

Fourth. Denies each and every allegation of Articles Fifth, Sixth and Seventh of the complaint.

Fifth. Admits that on or about the 12th day of December, 1907, a libel was filed in the United States District Court for the Southern District of New York by Frederick A. Egerton and another, owners of the tug Hiawatha against said barge Macy praying for damages caused to said tug upon the ground that the said tug on or about February 14th, 1907, ran upon the submerged barge Macy and was sunk because said barge had not been buoyed or marked by the plaintiff herein.

Sixth. Admits that plaintiff herein appeared in said suit in the United States District Court as claimant of said barge Macy and filed an answer therein and also a petition under the Fifty-ninth Rule in Admiralty of the Supreme Court to bring in the defendant herein into said suit and that this defendant appeared in said suit and filed answers to said libel and petition, also that such proceedings were thereupon had in said suit that final decree was recovered therein on the 23d day of June, 1908, in favor of the libellants and against said barge Macy for the sum of $4,945.17, and in favor of this defendant and against the libellants and the plaintiff herein dismissing the libel and petition with costs, also that thereafter on appeal by the plaintiff herein from said decree to the United States Circuit Court of Appeals, said decree was affirmed.

Seventh. Defendant denies each and every allegation of the complaint not hereinbefore in this answer otherwise put in issue or specifically admitted.

10 II.

And for a second and separate defense defendant alleges as follows:

On or about the 12th day of December, 1907, Frederick A. Egerton and Augustus Demarest, owners of the tug Hiawatha mentioned in the complaint, duly brought a suit in rem in admiralty in the United States District Court for the Southern District of New York, according to law and the practice in said Court, against the barge Macy, mentioned in the complaint, to recover damages for the same collision of said tug with said barge and injuries to said tug therefrom intended by the complaint upon the ground of neglect of the owners to locate and mark the submerged barge.

The plaintiff herein duly appeared in said suit and made claim to said barge as owner thereof and filed its answer to said libel answering the same upon the merits and denying liability upon the ground that such claimant had employed the defendant herein to locate and buoy and raise the barge, but the defendant herein had been unable with reasonable diligence to do so.

The plaintiff herein also duly filed its petition in said suit in admiralty, according to the law and the practice in said Court, alleging that it had employed the defendant herein to locate, buoy and raise said barge, intending thereby the same agreement and employment intended by the complaint herein, and that if there had been any neglect in locating and marking the sunken barge, it was that of the defendant herein and praying that the defendant herein be cited and brought in as a party to said suit in admiralty and required to answer the libel and said petition and held solely responsible for any liability to libellants for damages to said tug.

11 Thereupon the defendant herein having been duly cited, pursuant to said petition and in accordance with law and the practice in said Court, to appear in said suit and answer said libel and said petition, did duly file his answer in said suit according to law and the practice of the Court, admitting the jurisdiction of the Court, and answering said libel and said petition upon the merits, alleging that he had been employed by the plaintiff herein to raise and recover said barge and her cargo and had used due diligence to do so, but denying that he had been employed to locate or mark the wreck or had undertaken to raise or recover the barge or cargo within any specified time, and praying that the libel and petition be dismissed as to him for such reason.

Thereupon a hearing and trial was duly had in said suit in admiralty, upon the merits, upon the said issues of fact raised by said pleadings, and according to law and the practice in said Court, and the evidence upon said issues, including the issues as to the terms of said agreement between the plaintiff and defendant in this action intended by the complaint herein, was adduced by and on behalf of said parties thereto, including the plaintiff and defendant in this action.

And thereupon, upon such trial and hearing a final decree was duly made and entered in said District Court in said suit in admiralty on the 23d day of June, 1908, according to law and the practice in said Court, in favor of this defendant and against the said libellants and plaintiff herein, dismissing said libel and said petition as against the defendant herein.

Thereupon the plaintiff in this action duly perfected an appeal from said decree in favor of this defendant to the United
12 States Circuit Court of Appeals for the Second Circuit, and a new hearing and trial was thereupon duly had upon the merits upon the said issues between all of said parties to said suit in admiralty, according to law and the practice of the Court, and the Court having duly found upon said issues in favor of this defendant, a mandate or decree was duly made and entered in said Appellate Court the 1st day of June, 1909, affirming said decree of the said District Court dismissing the libel and petition in said suit as against this defendant, and thereafter said mandate and judgment of said Appellate Court was on the 10th day of June, 1909, by decree of said District Court duly made and entered, duly made the judgment and decree of said District Court according to law and the practice in said Court.

Said decree of said District Court did, without warrant or authority of law, state that the libel and petition were not dismissed as to this defendant upon the merits and that such dismissal was without prejudice to a separate action to determine the liability of this defendant, and said decree of said Appellate Court did, without warrant or authority of law, state that the same was without prejudice to the bringing of a new suit by the plaintiff herein against this defendant for the relief prayed for in its said petition in said suit in admiralty, but said trials and the decisions thereupon in said suit in said District and Appellate Courts were nevertheless in fact upon the merits upon the said issues of fact raised by the pleadings, including the issue as to whether this defendant had agreed with the plaintiff herein to locate and mark said submerged barge, and it was in fact found and determined in said suit in admiralty in said District and Appellate Courts, that this defendant had not in
13 fact agreed with the plaintiff herein to locate and buoy or mark said submerged barge as alleged in the complaint in this action.

Wherefore, defendant demands judgment that the complaint be dismissed, with costs.

WING, PUTNAM & BURLINGHAM,
Attorneys for Defendant.

Office and Post Office Address, 27 William Street, Manhattan, New York City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

John F. Baxter, being duly sworn, deposes and says, that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true

to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN F. BAXTER.

Sworn to before me this 14th day of August, 1909.
CHAUNCEY I. CLARK,
Notary Public, Kings County.

Certificate filed in New York County.

14 *Extract from Minutes.*

At a Trial Term of the Supreme Court, Held in and for Nassau County, at the Court House, at Mineola, Nassau County, on the 8th, 9th, and 10th Days of February, 1910.

Present: Hon. Sam'l T. Maddox.

BUCHHOLZ-HILL TRANSPORTATION CO.
against
JOHN F. BAXTER.

Armstrong, Brown & Boland, for Plaintiff.
Wing, Putnam & Burlingham, for Defendant.

This cause having been called in its regular order on the calendar, on motion of Armstrong, Brown & Boland, attorneys for the plaintiff, ordered that a jury be called and this cause tried.

Jury duly drawn, called and sworn, or affirmed, and cause tried.

The Jury retired in charge of a sworn officer, and subsequently they came into Court, and being called, handed up the following questions submitted.

1. Was there on Feb. 12, 1907, an oral agreement between plaintiff and defendant in relation to barge Macy? Yes.
2. Did that contract contemplate and include the locality of the barge Macy? Yes.
3. Did that contract contemplate and include the raising of the wreck of the barge Macy? Yes.

15 4. Did that contract contemplate and include the buoying of the wreck of the barge Macy for plaintiff, and that the same should be so done by defendant in discharge of plaintiff's duty to so buoy? Yes.

5. Was the defendant negligent in the performance of the contract as you find it to be? Yes.
6. Were the sinking of the tug Hiawatha and the consequent damage due solely to the negligence of defendant in performing said contract? Yes.

The Court thereupon, in accordance with stipulation, directed a verdict in favor of plaintiff for Five thousand five hundred seventy-nine and 52/100 dollars.

Defendant's counsel moved for a new trial on all the grounds

mentioned in Section 999 of the Code of Civil Procedure. Decision reserved.

Motion denied March 15, 1910.

THOS. S. CHESHIRE, *Clerk.*

Judgment.

Supreme Court, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

The issues in this action having come on regularly for trial at a Trial Term of the Supreme Court, held in the Nassau County
16 Court House, on the 7th day of February, 1910, the Honorable Samuel T. Maddox, Justice, presiding, the parties hereto having submitted their allegations and proofs, and the jury having returned a verdict in favor of the plaintiff and against the defendant on the 9th day of February, 1910, in the sum of $5,579.02, and plaintiff's costs having been duly taxed at the sum of $188.08.

Now, on motion of Armstrong, Brown & Boland it is

Adjudged, that the Buchholz-Hill Transportation Company, the plaintiff herein, do recover from John F. Baxter, the defendant herein, the said damages and costs amounting to $5,767.60, and have execution therefor.

Signed and entered in Nassau County, Mar. 24, 1910.

THOS. S. CHESHIRE, *Clerk.*

(Endorsed: Judgment filed March 24th, 1910.)

17 *Order Denying Motion for New Trial.*

At a Trial Term of the Supreme Court of the State of New York, Held in and for the County of Nassau, in the County Court House, Mineola, New York, on the 29th Day of March, 1910.

Present: Hon. Samuel T. Maddox, Justice.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

The issues in this action having come on for trial before Hon. Samuel T. Maddox and a jury at Trial Term on the 7th day of February, 1910, and the jury having rendered a verdict in favor of the plaintiff and against the defendant for the sum of $5,579.52, and the defendant having thereupon moved upon the Judge's minutes to set aside said verdict and for a new trial on the grounds that the verdict was contrary to law and contrary to the evidence and

against the weight of evidence, and on the ground that the issues presented were res adjudicata, now on hearing counsel for defendant in support of said motion, and counsel for plaintiff in opposition thereto, on motion of Wing, Putnam & Burlingham, attorneys for defendant, it is

18 Ordered, that said motion to set aside said verdict and for a new trial be and the same hereby is denied.

Enter,

S. T. M., *J. S. C.*

(Endorsed: Order filed April 7th, 1910.)

Case and Exceptions.

Supreme Court of the State of New York, County of Nassau.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,

vs.

JOHN F. BAXTER, Defendant.

The issues in this action duly came on for trial before Honorable Samuel T. Maddox and a jury at a Trial Term of the Supreme Court held in and for the County of Nassau on the 8th day of February, 1910.

Messrs. Armstrong, Brown & Boland; Pierre M. Brown, Esq. of Counsel, appeared for the Plaintiff, and

Messrs. Wing, Putnam & Burlingham; Messrs. Charles C. Burlingham and John J. Graham, of Counsel, appeared for the Defendant.

19 The counsel for the defendant opened the case by moving to dismiss the complaint on the ground that this Court had no jurisdiction.

The COURT: Counsel for the defendant states that in the District Court action, the defendant Baxter was brought in upon petition of the defendant there, the plaintiff here, and the same issue of negligence here presented was there tendered, and to which the defendant here made answer and plea of denial; is that so?

Plaintiff's COUNSEL: That is right.

The COURT: I am of the opinion that the language "but without prejudice to the bringing of a new action by appellant Baxter," for the relief prayed for in the petition against said Baxter, as appears by the order of the Circuit Court of Appeals adds nothing to the order whatever, and that it gives the appellant there, the plaintiff here, no added right, and cannot be availed of here to deprive the defendant of any right that he might have asserted. It does not cut off any right of his. I do believe that the language has not deprived this Court of jurisdiction.

Defendant's COUNSEL: I will except to your Honor's construction on that point.

The COURT: I will hold that the Court is not thereby ousted from jurisdiction.

Defendant's COUNSEL: I move to dismiss on the ground that the issue here tendered had been previously determined in the United States Circuit Court of Appeals.

The COURT: The bar presented by a plea of prior adjudication depends altogether upon the same issues having been presented and concluded by the prior adjudication.

20 It is clear to my mind that the questions here presented were presented in the Macy case in the Federal Court, the same issues. They were there litigated. To what extent it is needless for this Court to express itself. Though litigated there, the issue was not determined in the District Court, since in the District Court the Judge presiding saw fit to dismiss, but not upon the merits. That is nothing more or less than a non-suit in our practice; nothing more or less than that there had been insufficient proof to adjudge defendant liable. The plaintiff had failed in its proof, but it carries with it no adjudication as against the plaintiff, or in that case as against the petitioner in favor of the intervenor there, the defendant here.

On appeal to the United States Circuit Court of Appeals, the Court had jurisdiction to consider all the questions de novo, and could have given adjudication upon all the issues tendered, including the one as to which the District Judge had non-suited, but the Circuit Court of Appeals did not do so, and in thus determining I am led no less by the order that mandate issue, than I am by the opinion of Judge Lacombe, for on page 932 of the Federal Reporter, it will be seen that he says (and in this regard I shall abbreviate what I have to say so as not to include any questions here), it was a contract as between two parties. The question was as to what that contract was. The one says it was to do one certain thing and the other that it was to do something else, but not including all which the first claimed. The conversation was through

21 the telephone. We are persuaded that one man's recollection as to the conversation is the correct one. It certainly is inherently more probable. We are not satisfied from the proof that it was agreed between the parties that the one was to carry out any special obligation which the statute imposed upon the other. And so expressing himself, and thus speaking for the Court, the Court affirmed the judgment below, the decree of the District Court, which was simply a dismissal, but not upon the merits.

Now, to read the order for the mandate, it is decreed that the decree of the District Court be and it hereby is affirmed, with costs, and costs to the respondent, Baxter. The balance of that provision is of no moment here. It does not add to or detract at all from the real situation.

In view of what counsel for the defendant said in argument that we must presume that an issue tendered has been concluded and adjudicated upon, the rule, as I understand it, is that we are limited to the recital in a judgment record, and we can presume nothing outside of the recitals. I may be in error in that, but that is my

understanding of it, and I think Mr. Brown will agree with me that you can assume nothing in a judgment other than the recitals and the questions presented and determined.

My conclusion here is that there is not enough to show res adjudicata as between the plaintiff and the defendant in the previous action, which was an action in rem involving, of course, the liability of the individual who was brought in by petition in
22 the Federal Court. Exception to the defendant.

The jury was duly impanelled and plaintiff's counsel opened the case to the jury.

The COURT: Where I said "questions considered" I meant to be understood as saying "issues litigated and concluded and adjudicated, and issues tendered for adjudication."

To sustain the issues on plaintiff's behalf the plaintiff's counsel offered in evidence the libel filed by Frederick A. Egerton, and another, as libellants against the boat "Macy," filed in the District Court of the United States, Southern District of New York, December 12, 1907. The claim of the Buchholz-Hill Transportation Company and prayer to defend filed by that corporation with the Court.

The answer of the corporation in that suit.

The petition under the 59th rule of the Supreme Court of the United States in Admiralty to bring in the respondent Baxter.

The answer of Baxter to the petition.

The answer of Baxter to the libel.

The decree of the District Court of the United States upon those pleadings, filed June 23, 1908, awarding judgment against the canal boat Macy and her stipulators, for the sum of $4,945.17, and costs in favor of the respondent Baxter in the sum of $61.21. And the decree of the Circuit Court of Appeals affirming that judgment, with $61 costs.

Defendant's COUNSEL: I object, if your Honor please, on the ground they are incompetent, irrelevant and immaterial, par-
23 ticularly on the proposition which now attempts to conclude the defendant in this court on the question of damages. In other words, that the judgment of the Circuit Court in fixing the damages, the judgment of the District Court in fixing damages, is not evidence in this case as to the liability of the defendant Baxter.

The COURT: I take it the purpose of the offer and this proof is to show knowledge on the part of the defendant, and notice to him of the claim made. Knowledge of what took place, and of the proceedings up to the final decree of the Circuit Court of Appeals. That is so?

Plaintiff's COUNSEL: Yes.

The COURT: I will overrule the objection as to all up to the District Court judgment. Up to that point it is admitted. The balance of the offer is at present excluded.

Libel, answer of Buchholz-Hill Transportation Company, petition to bring in Baxter, answer of Baxter to libel, answer of Baxter to

petition and final decree of the District Court received in evidence and marked, respectively, Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6.

Plaintiff's COUNSEL: Then I will further offer the notice of appeal and assignment of errors filed in the District Court. The order for mandate made by the Circuit Court of Appeals, the mandate, and the decree of the District Court of the United States entered upon that mandate.

Defendant's COUNSEL: As to the new offer I make the further objection the offer of counsel is incomplete, and that the opinion of the Circuit Court of Appeals should be included to make the
24 record complete. This is the record of the litigation heretofore had which is now being offered, and to the extent it may be complete and perfect, I object to the introduction of these, unless in addition to these the opinion of the Circuit Court of Appeals, which is part of the record demanded by their rules, be offered also.

Plaintiff's COUNSEL: I object to incorporating that in my offer. It is not part of the record and never has been.

The COURT: The objection to the introduction as being incomplete is sustained, for the reason that as to the record we are controlled here by the rules in that record governing in the Federal Courts. And upon the further ground that in my opinion it is immaterial here what the result of that appeal was for the reason that there had been a dismissal, but not upon the merits, in the District Court; and the plaintiff here appealing therefrom, and not the defendant, Baxter, in so far as the question of damages may be concerned, by reason of such appeal only, by which I refer to the question of costs, signifies nothing here. For the purposes of this case, in so far as the same is presented by the pleadings, the determination in the District Court is sufficient as between the litigating defendants in the District Court action.

Plaintiff's COUNSEL: Ought he not to offer the opinion which he may do now, and I object to that and take my exception, to keep the record straight?

The COURT: It is a record, or it isn't a record. What is the record? The record, as I have indicated in my view here a
25 minute ago, takes in certain papers. Unless you include them all, you haven't the record.

Defendant's COUNSEL: Also the offer should include, to be complete, the transcript of the record, the evidence taken.

The COURT: No, I think not. The proofs there are not a part of the apostles' roll. I will overrule that part of it.

Defendant's COUNSEL: I except.

Plaintiff's COUNSEL: I now offer in evidence the Weather Bureau Report.

The COURT: You stand then upon the exclusion of your record, do you? I sustained the objection.

Plaintiff's COUNSEL: The objection is sustained, the record is excluded in the Circuit Court of Appeals?

The COURT: Yes.

Plaintiff's COUNSEL: Very well; that is excluded.

The COURT: Since, if any part of the record is missing, the whole record is not offered.

Plaintiff's counsel then offered in evidence the Weather Bureau Report as to the direction of the wind from eleven o'clock noon, February 12th on, which was received and marked Plaintiff's Exhibit 7, together with pages 29 to 38 of the printed record of the United States District Court proceedings, being the testimony of Eben H. Emery, Weather Bureau expert.

ADRASTUS C. SNEDAKER, sworn as a witness in behalf of the plaintiff, testified as follows:

On direct examination:

In February, 1907, I was the Captain of the tugboat
26 Hiawatha which belonged to Egerton. Two days after Lincoln's Birthday we came out of the Harlem River, from Fordham Bridge. We left there with an empty cement boat in tow; we had been down to the Morris Canal Basin. There was lots of ice on the New York side of the river which we had to buck through to get out from the Harlem River over under the Jersey shore. The river was clear about one-third of the way from the Jersey shore, or perhaps a little more. At that place the river is about three-quarters of a mile wide. About 4200 feet. There was a light air from the westward and the tide was ebb. There was not any ice on the west side of the river to speak of. We had this light cement boat, which is nothing more than a canal boat, and came down from the Harlem River; there was a little ice up in there, and when we struck the North River and came through the bridge, we ran into very heavy ice. We had to run some through that ice until we got over on the Jersey shore and into clear water, which the westerly wind was blowing the ice all over on the New York shore. When we got out of the ice, then we could come down full speed with the boat—come along all right until we got down by the power house just below Fort Lee, and we fetched up solid. Of course, we knew there was no obstruction to navigation, without it was something that would come there lately, because I was well acquainted with that part of the river running up and down all the time. So, of course, we had to get poles, and sound all around us, and we found a wreck under us, and made up our mind it was a coal boat, because we could punch the pole down into the coal on one side. In the meantime the boat commenced to fill with water; we couldn't go five feet off there with our own power, and there was another tugboat following us down, Mr. Dalzell's boat. He came to us and asked if he could help us.

27 There was no buoy on the wreck, nor any mark that I saw to indicate the existence of any wreck there. There was no ice to speak of where the wreck was. The river was clear of ice for from twelve to fifteen hundred feet from the shore towards the New York shore. It was clear water two or three hundred feet out beyond the wreck. The Hiawatha sank after we got off of the wreck, and she began to submerge herself, and go under, we got off

on the other tug. I didn't come back that night, but went back the next morning. My boat was then out of sight. Nothing showing. There were a few pieces of ice there. I assisted in locating the wreck. The engineer of the boat was with me and we were about the only ones there was that knew where the wreck was. Smith's derrick and two tugs went up with us. We first found the Hiawatha. That was the only one we were looking for. We found her from observations I took the night before, and from a little ripple that was over her, and a few sticks floating around her. I did some sounding with poles and lead lines. The Captain of the derrick went out in a row boat, but I did not go with him. I stayed on the derrick and just sounded. We found the wreck right away. I didn't look at that time to see whether there was anything there indicating the existence of the Macy to show where she had gone down. After we got our own boat we went up and looked for the Macy. We raised the Hiawatha right away. It took us, I suppose, three hours. We then looked for the Macy. We found her by seeing some fenders sticking up that belonged to her. They were about two inches thick, and about four or six inches wide, and 10 or 12 feet long. They stuck up perhaps a foot or so above water.

I saw them the next day after we ran on the Macy. I was
28 not up there on the 13th, the day before this accident to my tug. I couldn't say anything about the condition of the ice up the river on Lincoln's Birthday; I wasn't up that way very far; not above Hoboken. I have been navigating around the Harbor of New York some time and occasionally notice the effect of wind on ice. The effect of a westerly wind sets it over on the New York shore of the North River. That does not obtain more at one stage of the tide than the other. It might make a little difference on flood tide, might run it more to the westward, but hardly—if the wind was blowing to amount to anything it wouldn't.

Upon cross-examination:

It was cold weather at that time. I think it was making ice every night in or about the harbor and river. I don't remember exactly the temperature in the day time; it might have. The point abreast of Fort Washington Point, above Fort Lee, is about the narrowest place there is along there anywhere. If the river happens to be full of ice, it has a tendency to jam it there, if the cakes are large enough. I have seen the entire river betwen Fort Lee and the New York side completely filled with ice. That generally occurs on the flood tide. Conditions change very quick sometimes and instead of having a field of ice between Jersey and the New York shore, there may be comparatively free water within an hour, when the tide starts the ice going and the wind is blowing strong enough to get it all on one side. I have seen the river close up very quick, and I have seen it open very quick. It is subject entirely to the action of the tide and wind, and the quantity of ice which happens to be there at the time. When the Hiawatha sank, the whole of her pilot

house, about one-third of her lower house, and a very few
29 feet of the bow or stem of the boat showed above water. I did not buoy her. I had no spars aboard the Hiawatha which could have been converted into a buoy that I know of. There is about anywhere from 12 to 20 feet along there. We might have had a stick of wood of some kind we could have throwed overboard for a buoy but we didn't think it was necessary, because we didn't think in going away but we could go right back again. We left the Hiawatha about five o'clock and I didn't come back till the next morning. My people went right back within an hour and a half that same evening. I don't know how long they stayed there then. When they next went back to the Hiawatha, the next morning, the Hiawatha was absolutely gone. If anything of the Hiawatha showed at that time, it required buoying as well as the Macy.

On redirect examination:

I found the Hiawatha and raised her in three hours. Just as soon as it was daylight we were up there. Conditions might change with respect to location of ice in the river in an hour as a consequence of the wind shifting to another direction. If the wind shifted to the east it would send the ice over across the way, or to the east side of the river, and shifting of the wind west again would shift it back again. It isn't an unusual occurrence to see the North River on flood tide, with a westerly wind, filled with ice, field ice, from one shore to the other. It would be so on an ebb tide, too, if there was ice enough in the river, so the wind couldn't drive it far enough over to leave a clear space on one side or the other. If the river was full of ice the wind couldn't drive it one way or the other. Fort Washington is between one-quarter and a half a mile above
Fort Lee, I should judge; maybe a little more than that, and
30 on the other side of the river from Fort Lee. The wreck of the Hiawatha was within a couple of hundred feet; between two and three hundred feet; south from the wreck of the Macy, where we found her. After we struck the wreck, we drifted down about that distance after the Hiawatha was pulled off from the wreck.

On recross-examination:

We were on the ebb tide when we came out. The ice was then moving down river. I couldn't say what time the tide changed that night. There was a westerly wind blowing most of the time and the shore on the westerly side of the river was comparatively clear of ice, and the west wind continued after the Hiawatha sunk. The tendency of that wind would be to blow the ice across to the east side of the river. If there was so much ice in the river, that wind had no effect on taking away the upper works of the Hiawatha. I am not prepared to say that was not the condition from the 12th to the 14th. The weather was clear, with a light air westward around three o'clock in the afternoon. The upper works of the Hiawatha were taken away some time during the night. Fort Washington

makes a narrow space. If there is lots of ice below, when it gets up on the flood tide, the Point has a tendency to stop it, and, of course, it packs up in there. Even if the wind was to westward, and there was plenty of ice to come up on the flood tide, Fort Washington would stop it enough to fill the river full. That is the only way I could account for the ice carrying the house away with the wind in the same direction. At the time I left the Hiawatha, there was clear water around it. The Hiawatha sank about 3 P. M., the 14th of February, 1907, and was raised the very next morning be-
31 tween 9 and 10 o'clock; 10 o'clock, say. At that time there were some medium large cakes of floating ice, but they didn't affect us much, because we kept a couple of tugboats pushing away the big cakes. Of course, the little blocks didn't bother much. The Hiawatha was about 60 or 68 tons net, and about 65 feet long. I don't know her gross tonnage, I guess about 80. I testified before in the Egerton suit in the District Court.

WILLIAM B. WARRINGTON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

I was engineer on the tug Hiawatha at the time of this disaster. I remember the sinking of the boat and remember coming out of the Harlem River, The ice at that time was pretty heavy half-way or two-thirds across from the New York shore over, but we bucked through that ice all right. We got over in clear water on the Jersey shore and proceeded on down about as far as Fort Lee. I should judge at Fort Lee the ice was clear to the westward one-third of the way over from the Jersey shore. I couldn't say about the wind. The tide was ebb. I remember striking this submerged wreck. I was in the engine room when she struck. I wasn't looking out just before she struck. I felt the jar very quick when she did strike. The Captain rung the bell to stop the boat. He rang two more to go back, and I done so. We didn't move any, and he stopped the boat. Then I went below to see if she was making any water, and I found water on the fireroom floor. I got my pumps to work right away. They didn't do any good, the water came rising.
32 We had two siphon pumps and a steam pump. I couldn't back up with her. She hung fast to the wreck. A chock off the Macy went out through her bottom. The chocks were iron and hawsers are led through them. I preserved that chock. The Lohman came to our assistance with her steam pump, and that didn't do any good, and pulled us off, and the Hiawatha sunk. I went on deck but did not see anything right then sticking up there to indicate the existence of the Macy there. I went below. I didn't take time to look out. After I got below, and got my pumps to work, I came on deck, and seen the end of a fender sticking up 12 to 18 inches. I don't know what size this stick was—two by four, or three by six; I don't know just what it was. The fender of the Macy was only three or four foot away from the Hiawatha. When

we raised the Hiawatha the next day the chock was sticking in her bottom. It came away from the wreck, sticking up through the bottom of the Hiawatha. At the place where the Hiawatha struck this wreck, the river was comparatively clear of ice; only some drift ice; that was all; nothing to bother navigation. The place where the Hiawatha sunk was probably from two or three hundred feet from the wreck of the Macy over towards the New York shore. We went down in clear water. I went up there the next morning to assist in the wrecking operations. They asked me if I could locate the wreck, the Macy, and I said I could pretty near locate it. I told him we were right about where the wreck was; we took a lead line and sounded until we found the wreck. I didn't go out in a small boat, but the crew of the derrick did. There were two men anyhow;
maybe three. They rowed around and sounded the lead,
33 and they found first the Hiawatha. After we located the wreck, we started in to raise her by means of a derrick; didn't raise her with pontoons at all. We sent a diver down and put cables under it, and raised her in about three hours, I think I went away with the tug then in the slings, and did not come back there again that day. I went back the 22d of that month with Mr. Egerton. He went back there in connection with the wreck. He wanted to get some observations there himself. We found a buoy where the Macy ought to have been. It was about where we hit the wreck when we first went down. They were not wrecking on the Macy then. I didn't see anybody there, or anything but the buoy. That was the 22d. The Hiawatha went down so'th'ard or westward of the wreck of the Macy; inshore of the Macy. We found the buoy of the Macy above where the Hiawatha struck. The tide was ebb. The Lohman when she started to pull us away, was trying to take us to Fort Washington, I presume. That brought us down to the so'th'ard and westward of the wreck of the Macy. The Captain was in the pilot house steering the boat. We had a regular pilot—a regular Captain and Master.

On cross-examination:

Where the Hiawatha sunk, the water was comparatively clear of ice; some drift ice was all. Nothing to bother. It was somewheres in the neighborhood of four o'clock when they left her. It wasn't as early as three. I think it was around four o'clock. That was the time the Hiawatha sank. We then got on the Lohman and went over and went ashore at 129th Street. Then I came back to the
Hiawatha and got there somewheres between five and six
34 o'clock. I had been away from the Hiawatha all told an hour and a half. It was a staunch sturdy tug and her stays and works were securely fastened, decks and timbers. The pilot house stuck above water, and the smokestack, and they are guyed. These guys hadn't been interfered with or injured at all that I know. When I got back an hour and a half later, although there was no ice to speak of in that part of the river, all these upper works were gone. We did not buoy the wreck that night. We

went back to put lights on there, but we couldn't find anything to put lights on.

After we ran on the wreck I could see this fender sticking up. The end of it was plainly visible. It was sticking up out of water.

On redirect examination:

It didn't look like a piece of drift wood. It was sticking straight up, very conspicuously—a small piece of wood sticking up there. We knew what it was once we saw it. As soon as I looked at it I could see it was a fender, and from the position it was sticking up in the water, I could determine it was fastened to something below, and it was in plain view after we ran on top of it.

MONTE KEARNEY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

In the month of February, 1907, I was master of the Steamer Ben Franklin. I am a licensed Master and a licensed Hudson River pilot. I have been licensed about 28 years. The Ben Franklin is a passenger and freight steamer running between Yonkers and New York. On the 12th of February I made a trip with my steamer from Yonkers down, and went up the same day.

I left Yonkers seven or eight o'clock in the morning and left Franklin Street, New York, about ten. I had occasion to observe the condition of the river in coming down that morning and recall the fact of the sinking of this Macy. She had been sunk when I came down and I had information of that from my office by telephone. I looked out for it but saw no signs that morning; that afternoon up I saw her. On the trip up we left 12 o'clock noon on February 12th. We only made one trip this day. I saw the fenders on the trip up; not on the morning down. They were about 800 feet below this powder house dock. On the 12th coming down, we went through a lot of ice; I couldn't locate the Macy, but on the trip up, I could. When we came down, the ice was all over the river, on the up trip the ice laid over to the east shore. It was clear where these fenders were. Very near half of the river was clear. I think it was ebb tide. I made a trip down the next day. I was up in Yonkers on the morning of the 13th and we left there eight o'clock and passed down that morning. Half of the river was clear of ice; in the other half there was plenty of ice. We generally try to get as clear water as possible. We passed the Macy again and I noticed these fenders again that morning. We went back at three o'clock. We only made one trip the 13th, on the morning trip to Yonkers that day the place where the Macy sank was clear of ice. I went up that afternoon in clear water, through the center of the river. I passed the New York shore from the wreck and it was clear water there. At the point where the Macy went down, I guess the river is a mile wide, across. I was up in Yonkers the morning of the 14th and came down the same time, eight o'clock. We came

down the west shore. The river is generally clear of ice
36 over on the west shore. All the heavy ice runs generally to the eastward. We went between the New York shore and the Macy on this trip down on the 14th. I should judge probably a little more than one-quarter of the river was clear that morning—about two or three hundred feet from where the Macy went down. I went back that afternoon and the ice was then very light. I went up in the center of the river and there was clear water there. I made a trip every day except Sundays that month. On the 14th I saw the fenders. I think there were three of them. They looked like planks about six inches wide; about two or three inches thick. They stuck up above the water three or four feet, I suppose. When I saw them I noticed they were fenders. They had the appearance of fenders generally. They were in plain view so you could see them going down in clear water, unless the current was running very swift. They would go down with the tide and then would come up. They would be buried that way, probably an hour or so with a strong tide. The speed of the current up there is about five miles an hour. I have seen the buoys that have been put on wrecks. If there is much ice around they will go under and come up again. They bob up again when the ice passes. If the ice is very light they will stay up. A wreck buoy is a large light buoy, larger than the fender. The tide will not take such a buoy down in the North River. The buoy they put down, depends, so far as its length is concerned, somewhat on the depth of the water. The depth of water at the place where the Macy sunk is about 18 or 20 feet. That buoy was anchored with a stone and chain on it. The buoy sticks up, and when the ice comes along it goes under, and bobs up again when the ice passes. On the trip down from Yonkers there was ice; I couldn't see these fenders. I didn't locate
37 the Macy until afterwards in the day. It was reported to me from my office to be very careful, there was a sunken boat down there, to be very careful. How much of the time the fenders would be above water, and how much below depends on the condition of the tide. If the tide ran very swift, they would go down probably and bob up again. When only slack water, they would stay up all the while. If the tide was very fast, they would be under part of the time.

On cross-examination:

I saw the Hiawatha just prior to getting to the wreck. At that time I was coming up the river, bound north. And the Hiawatha was bound south. I was coming up through the center, she was over towards the west shore. When we first saw her we were at Manhattanville, 129th Street. She was on the Macy then. I didn't see her before she got on the wreck. The days I went up and down the river prior to the raising of the Macy, I saw these fenders. And the first morning when I came down the west shore was full of ice, and that is what obscured the fenders on that day.

WILLIAM M. SEAMAN, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

In February, 1907, I was employed with the New York Central and Hudson River Railroad. I was Master of Tug No. 12. I was a licensed master and pilot for the lower part of Hudson River, New York Bay, and Long Island Sound. I have been a licensed master for seventeen years, and I have been with the New York Central about twenty years. My boat didn't work February 12, 1907. I didn't do anything on that day. On February 13th in the morning at 7:40 we were breaking ice and placing car floats at Pier 31, North River, at Watt Street, downtown, New York. We didn't go up to Shady Side the 14th. We went up as far as 60th Street on the New York shore. There was plenty of ice up there that day on the New York shore. The ice extended out from the New York shore halfway across the river towards Jersey I should judge. We could see from 60th Street, North River, up the Hudson River towards Fort Lee, and that was the condition as far as I could see, on the New York shore. A westerly wind on the North River drives the ice over eastward, or on the New York shore. On a flood tide in the neighborhood of Fort Lee, it will swell the ice out, spread it across the river, unless there is a strong wind to blow it around. But a flood tide and westerly wind, will carry it to the eastward. February 14th we were working up around Shady Side and Edgewater, New Jersey. Edgewater is the adjoining town to Fort Lee, and Shady Side adjoins Edgewater. We were a mile and a half—a mile away below the powder dock. The river was comparatively clear of ice over there at that time, over halfway, anyway, to the New Jersey shore from my recollection. That day we took one float, barge, fro Shady Side to Edgewater, 1:45 P. M. to 2 P. M., took another barge from Edgewater to the West Shore Railroad, in Weehawken, 2:20 to 3:30, another barge from Shady Side to 65th Street, New York, 2:40 to 3:05 P. M. We did those jobs in good time; we finished that up. The ice couldn't have bothered us according to the time on the log. When the ice is bad up there we take our tows on a hawser. Under normal conditions, we handle our work alongside. On the 14th I was handling this work at Edgewater and Fort Lee alongside. At that place I could look up the river towards Fort Lee for this mile or mile and a half and the condition of the river was about just the same, halfway over it was clear.

On cross-examination:

I determine the condition of the river entirely from the memorandum that I had there as to what work I did on those days. And the fact that I was able to do the work I described is the only basis I have for my present recollection as to the condition of the river. That is the way we figure our work, the time we work, we know the conditions in the weather and river is O. K. Aside from my record, which merely contains an account of my day's work, I have no in-

dependent recollection whatever concerning conditions in the river from the 12th to the 15th. All I have to refer to is my log. Aside from that I have no recollection whatever. The paper refreshes my recollection as to the condition of the river on the 13th, because I was breaking ice on the 13th downtown. It refreshes my recollection as to the condition of the ice in the river on the 14th, because I know when I had to break ice the 13th, it certainly has not run out of the river the 14th. Speaking from my recollection, there was plenty of ice on the New York shore, on the 14th. On the ebb-tide it extended about one-third of the distance across on the 14th. I can't say now when the tide was ebb. I think it was flood tide on the morning of the 14th, at a guess. That is the best answer I can make. Ice moves differently with the tides, and while there
40 may be plenty of ice on the New York side on an ebb tide, the tendency of the flood tide is to bank the ice all across the river, up above around Fort Washington and Fort Lee. I know that the Macy was sunk about 1,000 feet below the powder house at Fort Lee. On flood tide, with plenty of ice in the river, practically the entire river between the powder house and the New York shore would be completely covered with ice. The ice will spread out there. I know nothing about the 12th, but on the 13th I know there was plenty of ice, and I know there was plenty on the 14th. When I testified I could look up towards Fort Lee and see that the river for one-third of it was clear of ice, I meant only on the ebb tide. When I looked across and saw the river was clear of ice for one-third, it was about 3 o'clock P. M. On the 14th, in the morning, we arrived at Pier 17, North River, 7 o'clock. We stayed there until 7:25 A. M. Then we went to Hoboken for a barge and waited there about five minutes for her, and then went to Pier 49 on the New York shore and placed the barge in her berth. We took one from there to Weehawken. We stopped at Pier 50 on the west side, in New York, for a barge which wasn't ready. Stopped at Hoboken for another one, and she wasn't ready.

While we were doing this work from Edgewater and Shady Side to Weehawken and 65th Street, the ice had gone up the river; it had scattered around. We handled the tow alongside that day. From the best of my recollection, I think it was about the first of the ebb tide then, and the ice was up the river at that time. I did not look towards Fort Lee at that time; we came from that direction.

On redirect examination:

On the 14th after I went to Hoboken to get a barge which
41 wasn't ready, we landed the previous barge with a tugboat up at Weehawken. Then went to the coal dock at Guttenberg to get coal; went down to the Marine shop, at the old ferry, Weehawken, New Jersey, dumped our ashes, and got stores. Then we took a barge from Pier 6 to Pier 12, Weehawken, around piers, that consumed 15 minutes; then we showed a few car floats around to the bridge there, from 12:30 to 1:15, on the Jersey side. We took two car floats from Weehawken to Pier 17, North River; took one car float from Pier 17 North River to Pier 31 North River; we took car floats from Pier 23 North River to the West Shore Railroad.

That was the end of my day's work, on the 14th. When the tide floods it spreads the ice out more over the river, and on the ebb tide it goes across.

On recross-examination:

I testified on behalf of the Hiawatha in the District Court.

SAMUEL D. FERNALD, called and sworn as a witness in behalf of the plaintiff, testified as follows:

On direct examination:

In February of the year 1907, I was on the tug Leader engaged in the business of towing. I have been a licensed master about 40 years. On the 12th of February, Lincoln's Birthday, 1907, I went to Yonkers with my tug to bring a steamer down from the Federal Refinery. I went on board the steamer and piloted her down, and my tug followed me down. We left Pier 9, East River, before daybreak to go up the river on that morning. We couldn't have been by Fort Lee before seven o'clock in the morning. I saw the
42 Macy before she sank. She was in tow of the tug Terry in the ice. I went close to them and asked the Captain of the tow boat if he wanted any assistance, and as near as I could judge, he said no. There was ice all over the river at that time at that point, just north of Fort Lee; from north up abreast of Fort Washington Point. I couldn't swear exactly where the Macy sunk. It was flood tide; going up on the flood. I came down past Fort Lee that day, I should judge, about eleven o'clock in the day, on the steamer. We had no trouble from the ice coming down, when we came down with the steamer. We went down west of the middle of the river. The ice was all near the New York shore. I didn't see anything of the Macy when I came down. I came down on the ebb tide. I should say the river was clear on the ebb tide from one-third of the distance across from the Jersey shore. With the west wind and ebb tide, the ice goes over to the New York side, with the tide flood and still a west wind it gets up in that narrow portion of the river, the ice goes up there above, and naturally fills in the narrow space. That is anywhere above Manhattanville; between there and Fort Washington Point and Fort Lee.

On cross-examination:

I testified in the Hiawatha suit in the Federal Court. I don't really know the dimensions of the steamship Malm, but I should say she was in the neighborhood of 240 or 250 or 260 feet long. She is an ocean steamer and she came from Cuba with the Captain of the Munson Line. I should judge she drew about 19 or 20 feet when she went up there. When she came down she was light; nothing in her. She was loaded with sugar going up; but nothing coming down. When I came down with the Malm, the
43 day the Macy sank, I had a pretty good idea where she sank. I didn't see her sink. After I passed by her, I turned around in the pilot house, and looked back to see what happened, and I saw the

tug going down the river; I should judge from that she sank. When I passed him going up the Macy was literally being overwhelmed with ice, and just naturally filled with water and pieces of ice in between the two hollows.

SIDNEY J. KELLY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

In the month of February, 1907, I was on the J. Fred Lohman which rendered some assistance to the Macy and Hiawatha. I was master and pilot on this tug. I have been a licensed master about 20 years. I was coming down the river from Yonkers at the time I saw the Hiawatha in trouble. I was in the pilot house. The Hiawatha was half a mile ahead of us when I saw him. I supposed he was coming down until I got close to him, then I saw he was fast to something, I didn't know what it was. That was about a quarter of a mile off the powder dock, I should judge; down below the powder dock. There was some drift ice where the Hiawatha was fast on this wreck. Nothing to bother navigation at all. He blowed his whistle, and I went to him and asked him what was the matter. He said he didn't know; he was fast on a wreck, or something. I asked him if he wanted any assistance, and he said yes, to put the pump in her. We put the pump in and pumping, she kept filling up still. Then we come to the conclusion we would try to pull her off
44 and beach her. So the captain gave me permission, and I put a hawser on her and on the Lohman. I tried to shove her inshore. She went down altogether. She went down so the pilot house was out of *order*, and the stack showed up. Then I took the boat he had in tow, and the men, and brought them over to 129th Street. After that I come back to put lines on the Hiawatha, but that was out of sight. There were fields of ice all over her. The tide had made flood at that time, and the ice had come back and torn the upper works away. She was completely out of sight; couldn't see her. After that I didn't go up to the wreck only to try to put lines on her. On the 14th I went up with the steamer Berwind to the Federal Sugar House. I piloted it. My boat followed me behind her. In going up there was lots of ice on the New York shore, and the Jersey shore it was clear in spaces. Off the powder house it was clear; that is in spaces. There was ice there, but you could see clear water at times. The ice didn't bother the steamer any. It would a small boat. A tugboat, or canal boat, or anything like that, couldn't go very fast through it. A tugboat could go through it light. The ice was packed up half way over from the New York shore, I should judge; and the rest from there to the Jersey shore was small drift ice.

On cross-examination:

When the upper works of the Hiawatha were taken away it was the last of the ebb tide. The space around the powder dock at Fort Lee, the river around there, was constantly changing, with reference to ice. On the ebb tide, that day, the 14th, according to the way

the wind was, the ice would be on the New York shore. On that day at the place where the Hiawatha was, there would be a clear space, and then some ice, and then some clear space—clear water at times. It must have been ice that carried away the upper works of the Hiawatha.

JOHN E. PETERSON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

I am captain of a derrick. I work for M. P. Smith & Sons, who are in heavy hoisting and wrecking business, raising boats. I have been working with wrecking firms about 19 years. I started with the Merritt & Chapman people. I worked with them quite a number of years. I have seen a good many wrecks raised. We have done a little of placing buoys too, when we had occasion. We raised the Hiawatha. I found it. We got up there with a derrick and tow in the morning about nine o'clock, and by getting a little information from the captain and the engineer of the Hiawatha, why, we anchored the derrick as near as we possibly could. Then by seeing a buoy or fender, which really was a fender—we took it for a buoy—a fender from the barge Macy, or coal boat Macy, we judged the distance from her, went out in a small boat sounding with a line and lead, and ran across her. I saw the fender sticking up in the Macy in the morning when we got up there. That was off the powder dock, probably about a thousand feet or so. About southeast from the powder dock. We went out in a small rowboat, and one man sounded for the Hiawatha and ran across her; I had a small piece of buoy in the boat, in order if I did find her I could go back with the derrick, and come up with her and find her, which I did. I placed a little buoy there, and went back to the derrick, and had the derrick put alongside where the tug was sunk. As near as I could judge, to locate that wreck it didn't take me over 15 or 20 minutes. Then we raised her. The morning we came up there there was no ice to bother us. There was one spell there, I guess about between 10 and 11, I had two tugs that was with us, they shoved the ice away, a cake coming with the flood tide, I had to push away—had them push away rather; otherwise we weren't bothered with the ice at all. We didn't have any ebb tide while we were there. It was flood all morning. We had ebb tide coming down. There are many kinds of buoys; there are spar buoys, and fender buoys. A spar buoy is a stick with a hole through one end, with a chain through it; others have a long iron strap with a link the chain travels in, and then attached to the anchor or weight was a log that is heavy enough to hold the buoy. They run from 12 inches thick and smaller, according to the depth of water, and the thing the buoy is laying in. When buoys are stuck out of the ice and the ice goes down over them they go under, and rise again the moment the ice goes over them. On the information we had about being a thousand feet off the powder dock, we went and located the wreck without trouble. During the time I was there, I saw fenders from the Macy

at all times. The greatest distance from the wreck of the Macy that I saw the fenders was three hundred feet. They were then in plain view to me. It was all slack water coming up, but we had a tide running during the time we slung the towboat and raised her, and we were just in the act of going at the change of tide from flood to ebb. The fenders stuck up about the same in slack water. The tide wasn't running very strongly where we were. It was not running at full force at any time while out there. We worked a diver
47 there, and if the tide was running full force, I don't believe we could work it. We had no trouble with the ice with the divers down. There wasn't anything impractical or difficult in putting a buoy over the Macy the day I found her there.

HOWARD J. VAIL, called and sworn as a witness in behalf of the plaintiff, testified as follows:

On direct examination:

My business is marine adjuster and surveyor. I know Mr. Baxter. Our company had insurance on the Hiawatha.

Q. Did you have any talk with Mr. Baxter over the telephone after the sinking of the Hiawatha; if so, please state it, and what the conversation was?

A. I called up Mr. Baxter to find out——

DEFENDANT'S COUNSEL: I object as incompetent. I can't see the drift of it. There is nothing in this case as yet that would make it competent, a conversation with this marine adjuster and the defendant Mr. Baxter.

The COURT: I don't know. It may be some declaration.

A. I called up Mr. Baxter to find out if he knew who the owners of the boat were that he was employed to raise in the vicinity where the Hiawatha sunk.

Mr. Baxter said he didn't know the name of the owner; that he got his order from the Home Insurance Company. I told him the Hiawatha met with an accident up in the vicinity of Fort Lee. I had another talk with Mr. Baxter. I told him I ascertained
48 who the owner was, and told him who it was. He said "Thank you." That was the 16th of February, the same day I had the other conversation and only a short time after it.

On cross-examination:

I got that information that Baxter had been employed to raise the boat from Mr. Egerton, the owner of the Hiawatha. I had no conversation with anybody else concerning Mr. Baxter's employment. I don't know where Mr. Egerton got his information as to who employed Mr. Baxter, or what the terms of his employment were.

PLAINTIFF'S COUNSEL: I offer in evidence stipulation entered into with respect to the amount of damages sustained by the libellant Egerton, owner of the Hiawatha, on account of this collision, the amount being $4,464.55, with interest from March 1st, 1907.

DEFENDANT'S COUNSEL: I don't object to the admission of the evidence as fixing the amount of damages that the Hiawatha paid, but for the purpose of concluding us as to whether we owe this plaintiff any damages or not, I object to it.

The COURT: I don't understand this involves any concession by the defendant of any liability?

DEFENDANT'S COUNSEL: None whatever.

PLAINTIFF'S COUNSEL: Oh, no; just the amount of damages only.

The COURT: Just simply the amount of damages which the plaintiff sustained.

DEFENDANT'S COUNSEL: At somebody's hands.

The COURT: At somebody's hands.

The same is marked Plaintiff's Exhibit 8.

49 PLAINTIFF'S COUNSEL: We offer to prove in addition to the damages sustained by the Hiawatha, the cost of the appeal, awarded by the Circuit Court of Appeals on the final order of the District Court, entailed by the appeal as part of our damages.

The COURT: And limited to that appeal.

PLAINTIFF'S COUNSEL: Second, the reasonable counsel fees incurred by the owners of the Macy in the defence of litigation in the United States District Court. Third, the reasonable expenses of the owners of the Macy in the same defense. Fourth, the actual disbursements of the appeal to the Circuit Court of Appeals.

The COURT: The costs and expenses including disbursements of the appeal from the District Court are, in my opinion, not a part of the damage of the plaintiff for consideration here. Those expenses, whatever they may aggregate, were taken upon the appeal of the plaintiff here to which *he* assigns error, not alone for the dismissal of the petition of the defendant, Baxter, but also from the adjudication of the liability to the libellant in that proceeding. That will be excluded.

PLAINTIFF'S COUNSEL: Exception.

The COURT: My reason for that is this, that there yet remained to the plaintiff under the suggestion of the District Judge, the right of action, and the appeal was not necessary in that regard.

PLAINTIFF'S COUNSEL: Next will be the costs awarded that is already proven in the record in the District Court.

The COURT: That is a matter you had better wait until the balance of your case is in.

50 BENJAMIN F. TAYLOR, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

I am in the employ of the Baxter Wrecking Company. I was in their employ in February, 1907, and in March of that year. I had charge of one of his steam pumps, the Baxter pump, a wrecking outfit.

Q. What was the first day you got word to go up and work on this boat?

DEFENDANT'S COUNSEL: I object, if your Honor please.

The COURT: Overruled.
DEFENDANT'S COUNSEL: Exception.

Q. What day?
A. On the 18th.
The first time I attempted to go up was on the 19th. I didn't get up. I went part way, then came back. The next time I went up was on the 20th. I got to the wreck and located it and put a buoy on her. The buoy stayed there until after I came away. I was there two days. I was succeeded by Captain Timmins, or somebody, I don't know who. Timmins went there. I saw the wreck before I got to it by some fenders sticking up. There were two, I took notice of at the time; one in particular. The buoy I put on her was 35 feet long and 10 inches thick, painted yellow, with a black top; one of our old gaffs, it was. It wasn't a wrecking buoy; it was a buoy I took along, for just my own special benefit on that job. I had it anchored by one shot of chain 90 feet under it, inch and a half chain, wired on the bottom. I got my orders as to the location of the boat from the office. They told me on the 18th to be ready
51 on the 19th; they would send me a tug. They told me that boat laid off the powder dock, about a thousand feet and a little below. I found her there.

On cross-examination:

I used my own judgment after I got those orders. I was told to go to the wreck and do the best I could with it. Get some coal out of her; pump coal. I was not told to raise the wreck. I couldn't raise her. I was told to go and pump the coal out of the Macy; to take part of that cargo. To do that I took up there a steam pump, and a lighter boat. I did not take the pontoons with me at that time. I should judge it was about 11 o'clock in the forenoon of the 19th when I actually got to the place where the Macy sank. There was quite some ice in the river at that time. The barge Baxter was a barge 19 feet wide, 82 feet long, with a boiler, pump and engine aboard her. She had six feet freeboard. When I got to the place where the Macy was sunk, I threw her anchors out, one each way, north, south, east and west. She was anchored up and down stream. At that time I stayed two hours. Then we went away for a harbor. Couldn't stay there any longer, on account of the ice which was running up and running down the river. If I stayed, it would have cut my anchor line and probably injured the boat. I went to 158th Street, New York. I went back to the wreck the next day. I got there between 11 and 12 o'clock, when the tide settled. There wasn't any more ice then the next day than there was before—the day before I lay there that day four hours pumping coal out of the Macy. I have been in the wrecking business about 35 to 38
52 years. We generally pump the coal out of the sunken boat in order to raise it. We do it that way to lighten the boat and take some of the strain off of her, to keep the chains from cutting. After my second day's operation there I went back to 158th Street on account of the ice. I went back to the wreck the next day, and got my anchors. I couldn't go there any more to work.

It got cold that night, and it made a field of ice. That was the 23d I went back and got my anchors. I didn't take my lighter boat out there. I had left my anchors when I went back to 158th Street; when the ice came down I just let them go and went on. I finally got about 225 tons of the coal pumped out of the boat, I should judge; might have been more and might have been less. I did not have any buoys in my equipment, no wreck buoys.

On redirect examination:

I worked up there two days. I got 225 tons of coal out in those two days, working two hours the first day and four hours the second. There was ice there at the time. I don't know the conditions that obtained there with respect to ice at that time before the 18th. During the time I was pumping out these 225 tons of coal the ice was one-half, or about half way across the river, and then there would be an odd cake that came down once in a while that interfered with me outside of the ridge. The main body of the ice was on the New York shore. If there hadn't been any ice to bother me, I could have put in the full time. Six hours we worked. We took some time to get the anchors down. That wasn't part of the six hours; eight hours altogether. There was four the first time and four the second; pumped coal two hours the first day. At the time I worked there
53 the main body of ice was, I suppose, a couple of hundred feet over toward the New York shore from the Macy.

On recross-examination:

The ice drove us away on the first of the ebb tide. The ice came right down the river, so I would have to get out. My headquarters are at Weehawken, which is about four miles from Fort Lee, right on the river front. We can see conditions in the river in a clear day pretty near to Yonkers. Between the 12th and 18th. I could see out on the river what the condition of the ice was. I ain't prepared to say how far up the river I could see those days. We look up the river and down; look all around to see how the ice is, if we are going to do any work.

By the COURT:

Q. State what you saw on any one of these days?

A. Saw plenty of ice in the river, so much so when we started we couldn't go. We got down to Edgewater and come back.

When I started on the 19th, I was being towed. The actual physical condition of the river at that time was ice from shore to shore. That was on the 19th.

By Plaintiff's COUNSEL:

Q. When you speak about looking out on the river, you mean at Weehawken?

A. Yes, sir.

Q. There was plenty of ice in the river?

A. Yes.

Q. As a matter of fact, the west wind takes it over to that shore?
A. If there is room to go there.
Q. If the whole river is not full of ice?
54 A. Yes, sir.

On the 12th of February, it was a holiday and I don't know as I was doing anything with my pontoon. I may have been away on some job on the 13th. I think I worked at 30th Street at that time. I recall a job at Flatlands, but that was not before the 30th Street job. I worked at 30th Street, North River, some time between this time and the time I went on the Macy, and worked at Flatlands also. I was working pretty near every day except the 12th, and my headquarters were at Weehawken. I started to work at seven o'clock in the morning. We were laying at Weehawken; that is our headquarters. We lay all our property there. If I was working at 30th Street on the 13th I would not go back to Weehawken every night. I had no occasion to go back to Weehawken when we were on another job, until we got through with the job. I live at Hoboken. I would go back home every night from my operations. The extent of my observation of conditions of ice in the river would be while I was going to my work and coming back, and through the day. If I worked at 30th Street, North River, I would not be supposed to see Fort Lee; I could look out on the river and see the conditions of ice at 30th Street. If working at Flatlands, I would not be supposed to look up the North River then. We only look out to see where we haven't any ice. Upon the whole proposition, I am able to tell the jury there was ice in that river the whole month, and plenty of it, so we couldn't go through it.

By Plaintiff's Counsel:

Q. Are you able to say whether it was on one side of the river or the other?
55 A. Sometimes it was, and sometimes the river was chock full.
Q. Yes, but at Fort Lee, can you now tell us whether your observation was such you are able to say at any time during those days the ice didn't go over on the New York shore?
A. Nobody couldn't tell how far out over my way, Weehawken; can tell the condition of the river, though.

By Defendant's Counsel:

Q. You know if the river down below at 30th Street or Weehawken is full of ice, you know from your past experience with the river and ice and current, there is more ice up above?
A. We generally find it so; yes, sir, when we have to go.

JAMES A. HILL, called and sworn as a witness on behalf of the plaintiff, testified as follows:

On direct examination:

I am the President of the Buchholz-Hill Transportation Company, which was the owner of the boat Macy. I live at Woodmere, Nassau County. The Macy sank the morning of February 12th, Lincoln's Birthday, 1907. Our company has no wrecking facilities. The business of the concern is owning coal boats and coal barges, which we run in conjunction with our coal business. I heard of the sinking of the Macy about 9:30 A. M., Lincoln's Birthday, February 12th. I was in the office. I first heard of the sinking of the Macy by a telephone conversation from Mr. Cartwright, the manager of the Cornell Steamboat Company, who told me, telephoned me, the boat was going to Yonkers, and had sunk in the ice; that his
56 message was got directly from the captain of his tug. It was indirectly, I believe, by telephone, and that his first message was that the boat went down off Fort Washington Point. He told me in the conversation that the captain of the tug Terry, which had the boat in tow, would be at his office a little later in the day, and would make his report in full, and at that time he would pass me along the exact information as to where the boat sunk. Within fifteen minutes after I got that information, I called up the office of the Baxter Wrecking Company, and I told the gentleman who answer-d the phone, which was Mr. Baxter, that I had just received information by telephone from the Cornell Steamboat Company our boat, the Macy, had sunk. I told Mr. Baxter I wanted him to find that boat and buoy her and raise her in the very earliest possible time. Mr. Baxter said he would get on the job at once. I told Mr. Baxter that Mr. Cartwright would be able to give him definite information where that boat sunk, and for him to talk to Mr. Cartwright about it, which he said he would do. The first thing next morning, February 13th, I called up Mr. Baxter to find out what he had done toward finding and buoying or raising my boat. I wanted to get her up. He said he had been able to do nothing toward locating the boat; that the ice had been too heavy, and he told me on the phone he had communicated with the Cornell Steamboat Company, and they had told him that the boat lay one thousand feet off the lower powder dock at Fort Lee. Then I said to Mr. Baxter, "Did Mr. Cartwright say you could have the captain of the tug Terry—offer to go down to your office or to go up on your
57 tug to help you locate the boat?" Mr. Baxter said yes, Mr. Cartwright had promised that to him. I may have called up Mr. Baxter again. We were in communication maybe once, twice or three times each day, but I don't remember anything more as to the substance of our conversations than just what I have stated here. The next day, the 14th, exactly the same thing happened. I called up Mr. Baxter and asked him again what he had been able to do toward the boat, and he said the ice had been so heavy that he had been able to do nothing toward even locating the boat. I called Mr. Baxter up every day, from our office, from the 12th

of the month right along until the 16th. The 17th, as I recollect it, was Sunday, and then the 18th, the 19th and the 20th. I learned of the sinking of the Hiawatha February 18th, or February 19th. As near as my recollection goes, it was the 19th. I received a letter from Mr. Egerton, the owner of the Hiawatha, stating his boat had sunk. I immediately called Mr. Baxter on the tel-phone. I told him I wanted him to come to my office at the very earliest possible time. He came down the next morning, the 20th, and he went through a detail of what he had been able to do, and it was to this effect: That he had been able to do nothing toward even going up there to locate the boat between the 12th of the month when he got my order, and the 19th of the month; that he had gone up there and sent up his wrecking apparatus, and had located the boat and put a buoy down, and every time a field of ice would come down he would have to stop work, and he saw that where he put the buoy was regularly washed away, and Mr. Baxter suggested we go over to see Colonel Lockwood of the United States Engineer Corps. We went over there and Mr. Baxter explained to Colonel Lockwood, in my presence, exactly the conversation he had in my office, to the
58 effect he had been able to do nothing toward even locating the boat until the 19th of the month, and he had gone up there and put a buoy down, and it was regularly washed away every time a field of ice came down the river, and he asked Colonel Lockwood to put a wreck buoy on that boat, and Colonel Lockwood replied it was absolutely out of his jurisdiction, and he referred us to Captain Rogers of the Light House Department, and we could use Colonel Lockwood's name. Mr. Baxter came back to my office, and I called up Captain Rogers by telephone, and I went over the whole story. Captain Rogers was head of the Lighthouse Board, Tompkinsville, United States Lighthouse Board. I called Captain Rogers by telephone. I told him exactly what Mr. Baxter had reported to me. Mr. Baxter was right in my office sitting on the other side of me possibly. I explained to him exactly what Mr. Baxter had told me he had been unable to locate the boat until the 19th, when he had gone up and buoyed the boat, and that the buoy was regularly washed away, and I asked Rogers to put a wreck buoy out on that boat. Captain Rogers replied he didn't do that for individuals, but he would do his very best to help us, and I gave him the location as to the wreck, and in about two or three days after that, a buoy was placed there by him. I confirmed that conversation with Captain Rogers by letter, and I sent one of my men down there to him the next morning with that letter.

Plaintiff's Counsel: I offer the letter in evidence from the Buchholz-Hill Transportation Company to Captain Rogers, dated February 21, 1907.

The same is received in evidence and marked Plaintiff's Exhibit 9, and read to the jury by plaintiff's counsel.

59 By Plaintiff's Counsel:

Q. And that information you communicated to Mr. Rogers, you got from Mr. Baxter?

A. Given to me by Mr. Baxter.

I did not do anything myself in regard to going up to Fort Lee to look at the weather conditions after I employed the wrecking company. I knew the importance of buoying this boat and knew about this Fahy case decided before that. Mr. Baxter did not at any time between the 12th and the time I called him up about the Hiawatha tell me about the sinking of the Hiawatha.

Q. Mr. Hill, how much—did you pay these decrees rendered in the United States District Court?

DEFENDANT'S COUNSEL: I object, if your Honor please.

The COURT: What?

DEFENDANT'S COUNSEL: The question is, did he pay the decrees entered in the United States Court?

PLAINTIFF'S COUNSEL: Pay the amounts ordered by the decree in the United States District Court.

A. I did.

Q. What was the amount you paid? What was the amount of the decree—that is admitted. What is the amount of interest on the decree—when did you pay it?

A. June 29th, 1909.

Q. What was the amount?

A. Total of $5,229.52.

That was this decree in the District Court below, the interest to that day.

Q. Did you pay counsel fees?

DEFENDANT'S COUNSEL: I object, if your Honor please, as
60 incompetent, irrelevant and immaterial; not a proper measure of damage here in this action.

The COURT: I will overrule that, to the end there may be a categorical answer, yes or no.

DEFENDANT'S COUNSEL: All right.

Q. Did you pay counsel fees owing to the firm of which I have the honor of being a member for services rendered in the litigation in the United States District Court brought by Egerton against you, in which Baxter was brought in?

A. I did.

Q. Those counsel fees were reasonable in amount?

A. Reasonable.

Q. Did you pay them?

A. I did.

On cross-examination:

I am 35 years old. I have been President of the Buchholz-Hill Transportation Company since its incorporation, 1903 or 1904. My business prior to that time was coal business. Practically the first time we became owners of boats of our own was after we became connected with the Hill Company. We first bought them in individual names; then it was more convenient to form a corporation. In 1903, I for the first time became a managing or controlling or directing

owner of a boat of the Buchholz-Hill Transportation Company. Before that time we had owned boats individually. I personally had an interest in six barges. While I was a managing owner I had had a boat sink. I can't recollect the names or the time before the Macy. There might have been more than one boat which sank, but I can only remember one. My office is No. 1 Broadway. I
61 have no other office on the river front. I have nine coal barges. They comprise all the boats in which my company has an interest. I cannot see the river from where I am, No. 1 Broadway. I am on the inside. I live in Woodmere, Long Island. At that time, 1907. I located in Woodmere for possibly nine months in the year, and New York two or three months. In the month of February, 1907, I was in New York. My residence in New York is No. 18 East 54th Street. I am confined to the office entirely in my business. I do not get reports from my captains. Our captains make no reports of weather conditions. We know whether or not our barges are being transported from point to point. Whey they fail to reach a given point there are excuses forthcoming for that failure. It is not a fact that during the month of February, particularly after the 12th of February, our barges were unable to move around with the same celerity and speed as theretofore. During the month of February we suffered no hindrance whatever in that part of our business from ice conditions in the river. We had coal barges regularly which were working in the North River above Fort Lee. They were working every day during the month of February between New York and Yonkers, and in order to go from New York to Yonkers, it would be necessary to pass Fort Lee every trip. There is no schedule time for coal barges to reach any particular point. They have no motive power; the tugs haul them. I knew that our business was not hindered or interfered — by ice conditions on the North River from the fact that our coal boats eventually reached the destination without damage with the exception of the Macy.

Q. All you know is if your barges arrived safely, you say she suffered no inconvenience from the ice; is that right?

62 A. True.

Q. And whether it took her one hour or ten days to get to a point of destination does not convey to you anything concerning the condition of the river?

A. That question I can't answer. Yonkers is but 12 miles from New York; that is as far north as we went, but the question of taking 12 days to go to Yonkers is absurd.

As far as I know, the mere fact a boat arrives at her point of destination safely is all I ever look for. That is sufficient for me. And whether our boat met any unfavorable conditions in the river, I don't know directly. I believe I would receive a report, if our boat was ten hours late, as to what caused the delay. I don't recollect receiving any reports from any of our captains during the month of February as to delayed barges. We don't reach the captains of the tugs who tow our boats, we reach the officers. We talk to the managers. I had a discussion with the manager on the 12th, of the Cornell

Steamboat Company, concerning the weather conditions on the river. He said the ice was bad that morning down opposite his office. I had a conversation the next day with him. I guess that would be all the conversation almost every day, because our business necessitates that. He told me what the weather conditions were during each of these days, as far as he could see from his office in 51st Street. He told me on each and all of these days the weather conditions in the North River were very bad—the ice conditions as seen from his office. I didn't transmit that information to Mr. Baxter in the conversation I have detailed I had with him because Mr. Baxter was in touch with Mr. Cartwright himself.

Q So, you were receiving from Mr. Cartwright who was
63 the manager of the company that you employed to tow your barges, or one of them?

A. That is right.

Q. The same information that Mr. Cartwright was giving Mr. Baxter; is that right?

A. I don't know what information Mr. Cartwright gave Mr. Baxter other than the fact he told Mr. Baxter our boat Macy sunk one thousand feet off the lower powder house at Fort Lee.

I got information concerning the different conditions of the river from Mr. Cartwright, maybe during the month of February, possibly three or four times I can't recall that I got it on the 13th. I got it on the 12th, the day the boat sunk. I can't answer whether I got it on the 14th. At these conversations I had with Mr. Baxter I have detailed our whole office would be present. They are not here in court.

Q. You called all the witnesses for the defendant—called for your side to-day or yesterday in this case, you called them—they were all called in the Federal Court where you were defendant?

PLAINTIFF'S COUNSEL: I object as incompetent; nothing to do with this case.

The COURT: Immaterial. Sustained.

DEFENDANT'S COUNSEL: Exception.

By DEFENDANT'S COUNSEL:

Q. Now, Mr. Hill, what was the exact language you used in your conversation with Mr. Baxter on the 12th?

A. I told Mr. Baxter I had just received information from the Cornell Steamboat Company that they in turn had received a phone message, that the boat Macy had sunk about off Fort Washington Point; that the captain had not yet returned to his office, and hadn't made up his detailed report, but would later, and I told Mr.
64 Baxter that I wanted him to find that boat and put a buoy on her and raise her at the very earliest possible time—I can't recall whether I said "put a buoy on her" or "buoy her"—I told Mr. Baxter that I had arranged with Mr. Cartwright to have him put in communication with the captain of the tug in which tow the Macy was, and for the captain to come down to Mr. Baxter's office and give him the definite location as to the bearings he took, and even, if necessary to go up with Mr. Baxter on that day and locate that boat.

That was all on the 12th. On the 13th nothing further was said about what Mr. Baxter was to do, except I asked Mr. Baxter the first thing what he had done toward finding and buoying and raising my boat. As near as possible I would say I used that collocation of words again. Same thing on the 14th, and the 15th, and all the time up until I heard of the sinking of the Hiawatha. My first object in making that contract with Mr. Baxter was to get a buoy on that boat at the very earliest possible time, and then I wanted my boat. As near as I recollect, I think I have told you all I told Mr. Baxter concerning the contract. I knew the Federal duty devolving on me. I knew what the statute provided.

Q. And it was in order to absolve yourself from liability under that statute that you engaged Mr. Baxter; is that right?

A. No, it was absolutely contrary. Mr. Graham. A transportation company has no wrecking facilities whatever.

I knew the statute imposed a duty on me with reference to buoying. I had no facilities for buoying or wrecking.

Q. And the purpose of your handing over the job to Baxter was in order to relieve yourself from liability for failure to comply with the Federal statute, and in addition to recover your boat?

65 A. Well, when I gave that order to Mr. Baxter——

Q. (Interrupting.) Can you answer that, yes or no?

A. I don't think I could, Mr. Graham.

I did have in mind, at the time of the making of the contract, this particular Federal statute. I knew if I didn't buoy the boat and an accident happened, I would be liable. But I can't say it was with that statute right before me in my mind's eye I made this contract with Mr. Baxter. I did have my duty under this statute before me when I made this contract. When I received word the boat in which I was an owner had sunk off Fort Lee, or Fort Washington, I knew the law cast on me a duty to buoy it. But I had no buoying or wrecking facilities whatever. I knew Mr. Baxter was in that business. I called up Mr. Baxter in order to get Mr. Baxter, to locate, or buoy and raise the wreck. The fact I was charged with that duty and wanted to absolve myself from the liability which would follow a failure to comply with that statute was the reason I called up Mr. Baxter. I did not say to Mr. Baxter anything about the statute at that time, the day the contract was made. Everything the contract contained was said or done on that day and this was the only contract I ever made. The Federal statute provides that there is a duty, as near as I can recollect it, without seeing it before me—I have a copy of it—when a boat is sunk in navigable waters it is the duty of the owner to see there is a buoy put on that wreck immediately. That is as near as I can recollect. As to penalties, I don't know. I don't know anything about it further, I can recollect.

Q. Don't you know the statute provides that in addition

66 to buoying the wreck, the duty is cast upon you of lighting the wreck at night, to hang a lantern out?

A. If the wreck is submerged, you can't hang a lantern on a wreck.

Q. You can hang a lantern on a buoy?

A. Not the way conditions were in the North River at the time.

Q. Do you know what the statute says at all?

A. Yes, as I have stated at first.

I don't insist the statute does not require where the wreck is submerged a beacon or buoy during the day, and a lighted lantern at night should be placed thereon. I didn't say anything to Mr. Baxter about lights.

Q. Is it your conception of your duty under that statute you would have had to light the buoy at night?

A. That was a question which would have been taken up, doubtless, when Mr. Baxter had advised me he had located the boat.

Q. Suppose he located the boat at night, would you have expected Mr. Baxter to have put a light on there and kept a man up there lighting it each night?

A. That was not talked of, Mr. Graham.

So far as I know, I didn't know at that time what the statute imposed upon me with reference to buoys or beacons or lights, except as I have told you. I do not recollect having a conversation with Mr. McLeod. I know Captain McLeod.

Defendant's COUNSEL: Captain McLeod in Court?

(A man stands up in the court room.)

By Defendant's COUNSEL:

Q. Know that gentleman?

A. I know him, yes.

67 I know what his business is. He is connected with the Merritt & Chapman Wrecking Company. I have known him, I should judge, for nearly two years now. I did not know him at the time of this wreck. I did not go and call on him at the time of this wreck, between the 12th and the 19th, and he did not come to call on me. I did not have any conversation with him between the 12th and the 19th of February, 1907. I did not go to Captain McLeod and say, "Captain, I have given the job to raise this boat to Baxter, but I want you to go up and buoy it," or anything in substance like that. I did not go to Merritt & Chapman Wrecking Company at any time between the 12th and 23d of February, 1907. I did not telephone them. I did not give instructions for either of these things to be done. My recollection of the contract was pretty fair at the time I wrote this letter, the 21st of February, 1907, as I recollect it. I signed it myself. The letter was truthful.

Q. Will you tell me why you stated in that, "We at once notified our insurance underwriters who in turn gave immediate notice to the Baxter Wrecking Company to locate and raise the boat at the earliest possible time."

A. That is perfectly right. It is the custom in the trade that the insurance underwriters will close with a wrecking company definitely to wreck and raise the boat. It is the duty of the owner to employ a wrecker to buoy.

Q. So your first contract with Baxter then was apparently one of buoying was it?

A. No, it was to do the whole job.

Q. What do you mean by your latest explanation it was the custom of the insurance company to close with the wrecker to find a

wreck, but it is the duty of the owner to make a contract to buoy?

A. Exactly what I said.

Q. Why did you include in your original contract with Baxter "Locate, buoy and raise?"

A. The owners if they press it, can employ any wrecker whom they choose, and I chose to employ Mr. Baxter.

I knew the Insurance Company was going to employ Mr. Baxter. I knew afterwards they were going to make a contract with him to locate and raise. I did not know at the time I made the contract with Baxter. I first learned of it afterwards. I should say perhaps one day after the 12th. I called up the insurance company on the 12th, and had a talk with them, the one that afterwards made the contract with Baxter, the Home Insurance Company. There are two classes of insurance here, cargo and hull insurance. I did not have a conversation on the 12th with the insurance company that communicated with Baxter. That was the insurance company that had insurance on the cargo. They as a rule do not make the contracts with the wreckers. I talked to the other insurance company the next day. They told me I done perfectly right in giving the job to Baxter. I told them I made the whole contract.

Q. Why, Mr. Hill, did you write on the 21st to Rogers, John A. Rogers, of the Lighthouse Inspection Board, that your insurance underwriters in turn gave immediate notice to the Baxter Wrecking Co. to locate and raise the boat at the earliest possible moment?

A. That is telling the truth. Mr. Graham.

Q. Do I understand there are two contracts, one with you and one with the insurance company?

A. No, but we both gave Mr. Baxter the order to do it.

Q. And the orders were identical?

A. No, they were not.

Q. What was the difference in them?

A. The insurance order, from the insurance company, did not include buoying.

Q. This says at the earliest possible time. Was — the contract you made with Baxter?

A. No, that was the insurance company contract.

Q. You say in this letter, "We understand the Baxter Wrecking Co. proceeded at once endeavoring to locate the boat."

A. That is exactly what Mr. Baxter told me.

Q. You knew very well he hadn't done any such thing on the 21st, didn't you?

A. I did not.

Q. Didn't you testify here during all these days from the 12th to the 21st or 20th, that you were in daily communication with Baxter, and he told you he had been unable to do anything on account of the ice conditions?

A. I did.

Q. What did you mean by saying, "We understand the Baxter Wrecking Co. proceeded at once endeavoring to locate the boat." when you knew all the time they hadn't done anything at the time you wrote this letter—that is, up to the 19th?

A. I knew exactly what Mr. Baxter had told me, that he had his wrecking equipment at his headquarters at Weehawken, and he was ready to start, but had been unable to do so on account of the heavy ice.

I considered then that was part of our endeavors to locate the boat to have their equipment ready at Weehawken, I don't now. When I wrote this letter I knew Baxter had done nothing except to have his equipment at Weehawken. My idea at that time was, I
70 had Mr. Baxter under contract to buoy the wreck. I went to the Lighthouse Board, or Captain Lockwood, I think it was, to get them to buoy the wreck, at Mr. Baxter's suggestion, and I was only too glad to do anything I could. When I called up Mr. Baxter on the 12th, and made this contract, Mr. Baxter did not tell me then that I had better go and see the Government people, and get them to put a wreck buoy on there. He told me he would go on the job at once. That was all he said except he was going to get information from Cornell. He did not at that time tell me I had better go to the Government people and get them to put a buoy on that wreck. As near as I can recollect, he came down to my office about the 20th of the month; it might have been the 19th.

By the Court:

Q. You say you knew Baxter did nothing until the 19th?

A. When he came to my office and told me that. That was about the 20th, the day before I wrote the letter to Rogers.

Q. And you say, your understanding of it was, that he had been employed by the insurance company, insurance underwriters as well as your employment?

A. As well as my employment.

Q. Now, if you knew Baxter had done nothing until the 20th, why did you in writing that letter to Rogers say, "We further understand they have regularly put out a spar buoy but each time the ice comes down this buoy is carried away." If he had done nothing, why did you say, "He had put out regularly a spar buoy?"

A. That is exactly what Mr. Baxter told me he had done
71 on the 19th, when he did locate the boat.

Q. A minute ago you said you knew they had done nothing until the 20th?

A. One day is wrong.

Q. Then up to the 19th you knew nothing had been done?

A. Toward locating the boat, your Honor, yes, sir.

Q. Didn't you say a few minutes ago you knew nothing had been done by Baxter?

A. I repeated exactly the conversation that Mr. Baxter told me.

By Defendant's Counsel:

Q. Do you now say that Mr. Baxter did suggest to you, you go to the Lighthouse Board and get a buoy put on the wreck?

A. No, Colonel Lockwood suggested that.

Q. What did you say to Baxter in connection with getting the boat buoyed or located after the 12th? Did he come to your office?

A. No, not until that 20th.

Q. When he came to your office on the 20th, was that the first time you had seen him in this connection?

A. I believe I had seen him for the week. It was the week after I gave him the order I hadn't seen him.

Q. Did you see him when you gave him the order?

A. No, it was by telephone.

I hadn't seen him at all for a week, at least. It was the 20th he came to my office. I didn't see him between the 12th and 20th. It is hard to answer when I had seen Baxter prior to the 12th. I met Mr. Baxter possibly once a week. Maybe I didn't see him for
72 a month; maybe we met going out of the building.

Q. What did you mean when you said a moment ago you hadn't seen Baxter for a week, when, as a matter of fact, you hadn't seen him for months?

A. I hadn't said that. I said I hadn't seen him for at least a week.

I can't answer how long it was since I had seen Baxter. I had daily talks with him by telephone. I asked Baxter to come to my office. I wanted to see him, because that was the first information we knew that he saw our boat. When he got there, he said from the time I gave him the order he had had his wrecking apparatus ready at Weehawken, to start out to locate and put a buoy and raise that boat, but, on account of the heavy ice, he had been unable to do anything until the 19th, and he said he located the boat on the 19th and put a buoy on the boat, and they started wrecking operations, and that every time a field of ice came down the river, they had to stop, and each time the buoy was washed away.

Q. Did he say "washed away" or "washed under?"

A. Washed away.

Q. What did he say concerning a buoy?

A. He said at that time we should go over to the Government and endeavor to get the Government's buoy put on her.

Baxter told me that on the 20th. That is the first time Baxter told me to go over to the Government and get them to put a wreck buoy on. After that I went over to see Colonel Lockwood, with Baxter. Mr. Baxter did the talking with Colonel Lockwood. I think I did some talking. I didn't ask Colonel Lockwood
73 to put a buoy on that wreck. I went over there at Mr. Baxter's suggestion. I think probably we were both to do the talking. I can't recollect now what I said to Colonel Lockwood. Colonel Lockwood said the buoy was absolutely out of his jurisdiction; he had nothing to do with it, and he referred us to Captain Rogers in the Lighthouse Department. I should say we were over to Colonel Lockwood's perhaps fifteen minutes or twenty minutes, maybe. I don't remember whether Mr. Baxter introduced me to Colonel Lockwood. I knew Baxter knew Colonel Lockwood. I went from there right back to my office. I telephoned Captain Rogers—I told him we had lost a boat in the Hudson River, and that the wreckers had gone up there on the 19th, and that was the first day they were able to locate the boat, and they had put out a buoy, but that buoy they had put out was washed away, and they had to take their wrecking equipment away each time the ice came down, and

I wanted him to put a wreck buoy on the boat. I never saw Rogers in my life. I did not know Baxter knew Rogers, and he didn't tell me he knew him. I thought I had Baxter under contract to put a buoy there.

Q. Why didn't you make Baxter go to the Lighthouse Board and get them to put the buoy on?

Plaintiff's Counsel: I object to that. What difference does it make?

The Court: Objection sustained.

We did not go to Merritt & Chapman, and talk to get it raised. We did not apply to them in any way.

On redirect examination:

The only time we asked the Merritt & Chapman people to do anything for our boats was exactly one year later than when the Macy sunk. It was on the occasion of the boat Ned Irish. She
74 sunk the early part of February, 1908, one year afterwards.

I believe that interview was with Captain McLeod, or some one in the office. On that boat the Baxter Wrecking Company declined. They said they had too much work to go up and find the Ned Irish. It sunk in the Hudson River off Inwood, I learned, one Sunday night. That was a year later, and a few days. The 19th and 20th, I had the interview with Captain Lockwood at the suggestion of Baxter, who went with me. That was on the 20th. Baxter told me he had not been able to do anything until the 19th, outside of locating. His buoys had been washed away. He suggested I get a big Government buoy and that was the suggestion I made to Captain Rogers. That was the 20th. Both the hull and cargo of this boat were insured. I hired Baxter before the insurance company did. Then I called up one of these insurance companies. The insurance company has no veto over this contract I made with Baxter. It is merely customary to agree in the selection of the wrecker.

Q. You were asked on your cross examination whether you—your coal boat was delayed by reasons of the ice conditions in February? Do you run these coal boats on schedule time?

A. None whatever. They run on tide.

Q. What amount of counsel fees did you pay to the firm of which I am a member for the defense of the action, in the action in the United States District Court?

Defendant's Counsel: I object.

The Court: I will overrule the objection, and in that connection will say that the tender of the question now is at the suggestion of the Court, that we submit questions to the jury to be answered under Section 1187 of the Code, and the Court will then deal with this question.

75 By Plaintiff's Counsel:

Q. What is your answer?

A. $350.

Q. Is that a reasonable amount, Mr. Hill?

A. There is an item of $145.20; that is in addition.
Q. What is that for; was it to pay counsel?
A. To pay counsel. The total amount was $495.20. As I said before I never knew of a lawyer putting a 20 cent charge, so I imagine it might have been for something else.

PLAINTIFF'S COUNSEL: Outside of the deposition of Mr. Emery, we rest. I will read that portion of Mr. Emery's deposition.

Plaintiff's case was thereupon rested.

DEFENDANT'S COUNSEL: If the Court please, I move to dismiss the complaint here on the ground the plaintiff has failed utterly to establish his cause of action. There is no record now before this Court in the Federal or Circuit Court. There is nothing except the evidence shown here to-day.

THE COURT: There is evidently some misunderstanding on the part of the counsel, or the Court. Plaintiff's attorney offered, as the Court then understood, first the record in the Federal Court proceeding in the District Court, which took in all to the District Court judgment. That was objected to by counsel for defendant. The objection was overruled, or the Court intended to be so understood, and to which the defendant is entitled to an exception and an exception shall be given in the record.

As to the record on appeal from the District Court decree
76 to and including the decree making the judgment of the Circuit Court of Appeals the judgment of the District Court, it was excluded by the Court upon the objection of defendant's counsel because it did not include the opinion. The offer did not include the opinion of the Judge writing for the Circuit Court of Appeals, to which plaintiff's counsel took an exception, and such was the procedure, as the Court understood it to be at the inception of the trial. Let that record appear. Motion to dismiss made and denied.

DEFENDANT'S COUNSEL: Exception.

Defendant's counsel opened the case to the jury on behalf of the defendant.

JAMES S. F. MCLEOD, called and sworn as a witness on behalf of defendant, testified as follows:

On direct examination:

My business is superintendent of wrecking. I am employed with the Merritt & Chapman Derrick & Wrecking Company. I have been employed by them twenty years. I know the plaintiff in this action, Mr. Hill. I have seen him and talked with him before. I remember seeing Mr. Hill in the month of February, 1907, in my room in the office of the Merritt & Chapman Derrick & Wrecking Company. As near as my recollection, it was about the 15th or 16th of February, 1907. Mr. Hill asked me if I would undertake to buoy a boat sunk between Fort Washington Point and Fort Lee. I told him no, not under the present conditions, we would not.

He said, as near as my recollection is, that Mr. Baxter had the contract to raise the boat, and there had been nothing done; that is as near as I can recollect it; I wouldn't say the exact words.

77 On cross-examination:

Mr. Hill came down to my office somewhere about the 15th or 16th of February. My recollection is so keen because I remember about the Hiawatha being sunk; I heard about her being sunk. That was what brings it to my recollection. Nobody was in the office in my room at the time Mr. Hill came down, I don't think. That was two or three days after this boat was sunk, I won't be sure of the exact date. I don't know whether he still had the Baxter Wrecking Company employed to wreck the boat. I know now the Baxter Wrecking Company was on the job. Mr. Hill told me that the Baxter Wrecking Company had the job of raising the boat. He wanted to know if I wouldn't undertake the buoying of the boat.

Q. There were going to be two wrecking companies on the job, one to go out and find the boat—Baxter would have to find the boat, wouldn't he?

A. I don't know.

Q. He couldn't raise that boat until he found her, could he?

A. No, sir.

Q. If he found her he could put a buoy on her in five minutes?

A. I don't know that he could.

Q. In fifteen minutes?

A. I don't know he could. If he had the buoy ready he might do it in fifteen minutes.

Q. Therefore, he wanted you, the Merritt & Chapman Derrick & Wrecking Company to go there and do that work in fifteen minutes—that is a fifteen minutes' job?

A. I don't know that he did.

I did not have a conversation with Mr. Hill about a year later about Ned Irish. When the boat Ned Irish sank at Fort Washington a year later he did not come down and tell me he wanted
78 me to buoy that boat, raise and find it. I will not swear he didn't talk to me about that. I won't swear he didn't try to hire me for that job. My memory about a year before this is clear. I was called as a witness in the other trial and told all about this thing. I don't remember whether I ever said a word about this thing I am now testifying to on that trial. I don't think I was asked. I wouldn't be sure there were no other witnesses in my office who had heard his conversation, but I don't think there was. I have not asked anybody that was around there.

On redirect examination:

Mr. Hill and Mr. Brown called me as a witness for them in the other suit.

PLAINTIFF'S COUNSEL: We didn't call him at all.

DEFENDANT'S COUNSEL: We offer in evidence complete record of the trial in the District Court as contained in this printed book of

250 pages, including the libel, answer, the petition to bring in Baxter, answer of Baxter to libel, answer of Baxter to petition, testimony before the Court, final opinion of the District Judge, final decree, claimant's notice of appeal, claimant's assignments of error, opinion of the Circuit Court of Appeals, order of the Circuit Court of Appeals for mandate, and final decree of the District Court on mandate of June 10, 1909.

The Court: You refer to the order of Judge Adams?

Defendant's Counsel: Yes.

The Court: June 10, 1909.

Plaintiff's Counsel: To which we object, in so far as it purports to incorporate the testimony taken in court, and the opinions of the two courts—otherwise we don't object—on the
79 ground that is no part of the record.

Defendant's Counsel: Do you waive the question of proper certification?

Plaintiff's Counsel: Surely.

The Court: In other words, you concede the papers are in form admissible?

Plaintiff's Counsel: Just as if they were exemplified.

The Court: The Court has admitted on the offer of the plaintiff the record of the case in the District Court excepting the testimony and the opinion of the District Judge, and in so far as this offer includes the same papers, my ruling now will not affect that. I can readily appreciate, as I assume, the purpose of the offer is to establish a former adjudication upon the questions here involved.

Defendant's Counsel: Yes, sir.

The Court: And counsel conceding that there has been no reversal of the judgment dismissing the petition as to the defendant's action in the District Court, consequently the record here is, in my opinion, not admissible. The objection to the offer is sustained. Let the record, however, be marked for identification, so that question may be presented for review, and exception to the defendant on the ruling.

Plaintiff's Counsel: I would like to have it appear on the record we don't object to the reception in evidence of all the papers except the opinions and testimony.

The Court: I understand counsel is willing all should go in but the opinions.

Plaintiff's Counsel: And the testimony.

The Court: Do you accept that?

Plaintiff's Counsel: Both opinions and testimony, yes, sir.

80 Defendant's Counsel: We urge and insist, so far as we can, that the opinions go in.

Plaintiff's Counsel: Then you don't want any of the record in at all.

Testimony before District Court, opinion of District Court and opinion of the Circuit Court of Appeals marked, respectively, Defendant's Exhibits X, Y and Z for identification.

Claimant's notice of appeal, claimant's assignment of error, order

of the Circuit Court of Appeals for mandate, form of mandate and final decree of the District Court on mandate received in evidence and marked, respectively, Defendant's Exhibits A, B, C, D and E.

JOHN F. BAXTER, the defendant, called and sworn as a witness in his own behalf, testified as follows:

On direct examination:

I live in New York City. I am in the wrecking business. I am the defendant in this action. I have been engaged in the wrecking business thirty odd years. I did not create the business. My father before me had it; I was a partner with him. I know the plaintiff in this action, Mr. Hill. I first met Mr. Hill some time ago; previous to this case; previous to 1907. I remember the day, February 12, 1907. I remember talking with Mr. Hill on that day, in my office. Mr. Peck, my chief clerk was there with me. I had the conversation with Mr. Hill along maybe 11 or 12 o'clock in the morning. That was a holiday. Mr. Hill notified me of the fact that his barge Macy was sunk. Said she was sunk off Fort Washington, and he wanted me to take charge of the job and get his boat up. That is substantially the language he used, that he wanted to recover
81 his boat. The conversation took only a few moments. At that time he said the wreck could be found at Fort Washington. No further bearings were given to me. I told him that under the conditions that I knew of my own knowledge to exist, we could do nothing toward the finding or recovery of that boat while ice was running in the river. I knew the conditions. I had employees and captains working for me and I was personally familiar with the ice conditions in the river. I was in a position during the time prior to the 12th where I could see the condition of the river.

My office is near the foot of Spring Street, that is near the foot of Canal Street, but I live up on Harlem Heights.

Coming and going from my home I can see the river as far as Fort Lee; and Fort Lee and Fort Washington are about opposite each other, Fort Washington being a little higher up and on the New York side. During the few days prior to the 12th there were days when the river was full of ice from shore to shore. And there were days when it was somewhat more clear on one side than the other. Mr. Hill did not tell me anything about the conditions in the river when he talked to me on the 12th, except the fact that his boat had been sunk by ice. He mentioned that. Mr. Hill on that day did not say one word to me about buoying the wreck. I told him distinctly that we could do nothing while the ice was running. I talked to Mr. Hill every day; day after day.

At the time of the second conversation, that was on the 13th, Mr. Hill called me up, Mr. Peck was in the office. On that day we talked about this case, the recovery of this boat. Mr. Hill asked me what we had done about it. I told him we had been able to
82 do nothing about it. My advice to Mr. Hill right from the start was to get the United States Government to put a buoy on that wreck. I didn't tell him, as he said here, our buoys were

washed under. If I said anything about it, I said they were carried under by the ice. My advice to him was to do two things, to notify the United States Government of the fact his barge was sunk, and ask them to put a buoy on her. I think I first told Mr. Hill that on the 13th. On the 14th the conversation with Mr. Hill was the same. He called me up and I told him we had been unable to do anything about the job. We had three conversations daily—several days; I don't recall—after the Hiawatha sunk. From our place over in Weehawken, we could distinctly see on an ordinarily clear day, might not to-day, but an ordinarily clear day you could see as far as Fort Washington. Further than that, the ice swept by us, from back and forth, on every tide. Weehawken is about abreast of 42d Street, New York. Our wrecking equipment was at Weehawken.

On the 18th our wrecking equipment started out to the scene of the wreck by my orders. Captain Taylor was in command of it. There was lots of ice in the river on that day. Mr. Hill asked me to go with him to the Lighthouse Board or the Government. It was three or four days after the Hiawatha sinking. Mr. Hill called me up on the telephone and asked me to go with him to what they call the Army Building on Whitehall Street. He said he wanted me to introduce him to Col. Lockwood. He asked me if I knew Col. Rogers. I told him I did. He said he wanted to have his wreck buoyed. I went with him. When we got there, I introduced Mr. Hill to Col. Lockwood. Mr. Hill told Col. Lockwood that his barge had sunk, and he was very anxious to have a Government
83 buoy put on the wreck, and the Colonel told him that didn't rest with them, it was a matter for the Lighthouse Board down in Staten Island to take up, and he was requested to use his influence to get them to put a buoy there. I have seen wreck buoys. They are unlike anything else; that is what they are like. They are unlike anything else. The advantage of having a wreck buoy is so a mariner can tell the minute he sees it that that buoy marks a wreck. It is painted in such a way he can tell at once, but he is not only able by the color, the way it is painted, he knows which way to pass, either to starboard or port hand of that buoy. At that time while Mr. Hill and myself were talking to Col. Lockwood he referred us to the Lighthouse Board, Col. Rogers. Mr. Lockwood promised to speak to the Lighthouse Board about putting a buoy there. He advised Mr. Hill to communicate with Colonel Rogers. Mr. Hill said he would. I have never been up to the scene of the wreck.

On cross-examination:

My recollection is very good, indeed. I guess it was just as good at the time I testified before in the action. My recollection of the conversation was that Mr. Hill called me up and asked me to go up and take the job and recover the boat. I told him distinctly from the start, and never varied one iota from it, we could do nothing. By taking the job we were under obligation to get that boat when in our judgment it was fit and proper to take our property up there,

and let it lay there. Taking the whole job didn't mean buoying the boat at all.

Q. Do you say it is not a part of the wrecker's duty when he finds a boat to put a buoy on her?

A. Only when doing the work we have to, yes. When we
84 locate a wreck, we put a buoy on it. I told Mr. Hill right away I couldn't do anything. I told him it every day; day after day. On that day I said I couldn't do anything. I met Mr. Cartwright that day. I told Mr. Hill I would call up the Cornell Steamboat Company. He didn't advise me to. Because we were on rather good terms with them, I called them up, and I got Mr. Cartwright who was then in charge of the office. I asked him about the sinking of his boat, and where it was sunk, and he said—no, I asked him to put me in communication with the captain of the Terry, the tugboat that had this boat in tow. He said, "Mr. Baxter, I will be pleased to; he is not here to-day." Further than that, he says, "From my office on the end of 51st Street dock, I can see up the Hudson River as far as Yonkers, but it would do you no good if he was here to talk with you, because the river is full of ice from shore to shore. So I didn't get the information from Mr. Cartwright at all.

I live on St. Nicholas Avenue. It is only three blocks from the river. From Amsterdam Avenue you can see right down to the river. You come first to Amsterdam Avenue. The next avenue is Broadway, I think. The next is Riverside. I live in my own house between 148th and 149th Streets on St. Nicholas Avenue. I cannot see from where I live to the river. I go up and down town on the elevated. I see the river going up and down town, while I am on the trip. I cannot see from 148th Street over to Fort Lee. As you get down about 125th Street, you begin to open up on the river. I don't dispute what the witnesses testified at all as to the ice being over on the New York shore all the time. If the ice was over on the
New York shore from the middle of the river for two or three
85 hours it might have been possible to have gone up and located the boat. That is not long enough to find out nor to do any wrecking.

Q. Didn't Mr. Taylor testify he worked two hours around it?

A. That didn't do the job, nor four hours the next day even though they took out 225 tons of coal or 400 tons in six hours.

Positively there was no clear space in the river where you could work from the 12th to the 19th more than six hours. I heard one of the witnesses testify that Mr. Kearney, Captain of the steamer, went up and down to Yonkers in the middle of the river, and the river for days was free from ice out in the middle. I didn't depend absolutely on my own observation, but from one who knew something about it. I go up in the elevated in the evening and down in the morning. That is all I know about it.

There was no contract made at all; never any contract made about that job with me. All that Mr. Hill asked me to do was to recover the boat.

Q. Were you not asked this question on your prior testimony.

"Q. Did he say anything to you about buoying her?

A. No. The order was to recover his boat, and that called, of course, for locating; and I, the same morning called up the Cornell Steamboat Company."

That was my testimony. The obligation to recover the boat did contemplate locating her.

Q. You were asked this:

"Q. One moment before we come to that. He says that he used this phraseology, 'I want you to locate, buoy and raise the wreck.' Did he say that?

A. No, hardly as precise as that."

86 My memory was pretty good then. Mr. Hill didn't say that. I am certainly absolutely sure of that. I wouldn't listen to it a moment. My memory is fairly good I call that.

Q. Wasn't this your answer: "No, hardly as precise as that"?

A. No, I didn't want to bear too hard on him then.

I don't regulate my testimony according to my feelings for a man. I will tell you the truth. He didn't use the word buoy, I say.

Q. And when you said, "Hardly as precise as that," you were a little doubtful about it?

A. You are talking about buoying a boat now.

Q. I want to call attention to another point on the question of recollection. You were asked this question:

"Q. Was anything said about buoying the boat?

"A. To the best of my recollection I will say it was simply to recover the boat."

Is that your answer?

A. That is my answer. At that time my recollection was it was simply to recover the boat. I am certain Hill didn't use the word "buoy." I am also equally now certain I told Mr. Hill then I wouldn't do it. I told Mr. Hill then I couldn't do anything on account of the ice. I said something about that condition on the last trial. I said distinctly, I told Mr. Hill that we could do nothing towards the recovery of his boat while the ice conditions were there. I am quite certain I said that a year ago.

I have been thirty years a wrecker. The Baxter Wrecking Company has been in existence thirty years. I knew it was the statute for the owner of the sunken boat to put a buoy on it. I knew

87 it was an absolute duty. It was of the very highest importance. I knew about this Fahy case that had been decided for failure to buoy. I don't know that I discussed that with Mr. Hill. Within a day or two after this contract I told Hill to go and get the Government to buoy the boat. I won't be precise about the day. I don't know positively whether or not I didn't go and tell him to buoy that boat until after I learned the Hiawatha had sunk; it is only a matter of two or three days anyhow, you know. There was one intervening day to find and buoy that boat. I will say within two or three days after I had this conversation with Hill, I called Hill's attention to the importance of going down to the Government and getting them to buoy the wreck. I think it was before

the Hiawatha sank. I am quite sure about that; it was very much impressed on my mind it was necessary.

I will answer the question whether it was before I learned the Hiawatha sunk or after that I called Hill's attention in this way. If Mr. Hill said one single word to me about buoying that boat, I positively told him then and there about seeing the Government about buoying it; that is an answer. I think this conversation and advice I gave Mr. Hill was before the Hiawatha sunk—before the trouble at all.

Q. Didn't you in the trial a year ago, didn't you state this—

"Q. Did Mr. Hill call your attention to the necessity to buoy or did you call his?

"A. I did.

"Q. Where was that?

"A. From our office on the telephone. We were in conversation most every day.

"Q. State the conversation you had with him about buoy-
88 ing the wreck? Two or three days before the 21st this was. Can you state that conversation that you had with him about the 18th or 19th?

"A. About putting the buoy there? I told him that it was a very imperative thing to try to persuade the Government to put a buoy on that wreck and I gave him Captain Rogers' name and address and I told him I would go down with him and I would see Colonel Lockwood, and I did."

I say this, if Mr. Hill said anything to me, whenever that was, about buoying that boat, if he mentioned that, that advice would have been given him. I think it was before I learned the Hiawatha had sunk, because I realized it was important to have it done.

I won't say that my recollection is better now than it was a year ago.

Q. I call your attention to another part:

"Q. And the conversation with Mr. Hill with reference to buoying the boat was on the 19th?"

Plaintiff's Counsel: He does not say that.

"A. I haven't said so.

"Q. Was it two or three days before the 21st?

"A. I told you probably two or three days.

"Q. Before the 21st?

"A. Yes, that is as near as I can come to it.

"Q. Who first mentioned the buoy, you or Mr. Hill?

"A. He."

Q. Mr. Baxter, calling your attention to those two things, which is right, did he suggest the buoying, or did you?

A. He said he suggested it right on the spot, right the first day.

Q. I am asking you the fact. You now testify you told Mr. Hill the importance of buoying?

A. Yes, I did.

89 Q. Before you answered this:

"Q. Who first mentioned the buoy, you or Mr. Hill?" Your answer is "He." Which is right?

A. Well I mentioned it to him.

Q. This answer you gave a year ago is wrong, isn't it?

A. No, I won't say that, because we conversed every day about that. You are picking out a particular day.

Q. One or the other must have first suggested the importance of buoying. You now testify it was you, and then you testified it was he. Which is it?

A. Well, I realized from the start——

Q. Which is right, one or the other?

Defendant's COUNSEL: The text shows they are talking about two different propositions. I suggest it would be fair, two or three questions preceding should be read.

The COURT: Yes, read them.

Plaintiff's COUNSEL: Please answer the question.

Q. (Reading:) "Q. Was your first conversation with Mr. Hill with reference to putting a buoy on that sunken boat the time you went with him over to the Lighthouse Board?

"A. No, sir.

"Q. How long before that conversation did you speak about putting a buoy on it?

"A. I can't tell exactly; probably two or three days.

"Q. The Lighthouse Board conversation was on the 23d of February, wasn't it?

"A. Yes, sir.

"Q. And the conversation with Mr. Hill with reference to buoying the boat was on the 19th?

"Mr. BROWN: He does not say that.

"A. I haven't said so.

90 "Q. Was it two or three days before the 21st?

"A. I told you probably two or three days."

Q. When did the Hiawatha sink?

A. She sunk on the 14th. I knew it the next day, the 15th. There is a matter of two or three days there; I won't be so positive. I don't think it a fact that I ever said anything about going to the Government or buoying this wreck to Hill by the Government until after the Hiawatha sunk. And there was nothing in this contract between Mr. Hill and myself in regard to buoying. That is absolutely true. I verified the answer in the United States District Court.

Plaintiff's COUNSEL: (Fol. 52 of the Record.)

"He"—referring to me, "never agreed or undertook to locate or buoy or raise the wreck except as the weather conditions permitted." That is right.

Q. Then, if the weather permitted, the duty did lie upon you to go and find the boat, and put a buoy on the boat and raise it, if the weather permitted?

A. The ice conditions.

Q. I mean if the weather permitted, your duty was to go and find the boat and put a buoy on the boat and raise it?

A. No; that wouldn't settle it at all. If you listen to me, I didn't put that expression in there; that is the lawyer's expression.

If the weather permitted—if the ice conditions permitted. The duty was on us to go ahead and get that boat, and if we had gone up and tried to find that boat—gone to work on it, we would have put a buoy down.

91 Q. Don't it get down to this: If the ice conditions were all right for a wrecker to go out there, it was up to you to go and find the boat and put a buoy on it?

A. If in our opinion they were right for to put our property on there.

By the COURT:

I had some talk about recovering the boat on more than one occasion. On no occasion was one word said about an independent buoying of the boat separate from the recovery of the boat.

By PLAINTIFF'S COUNSEL:

The contract of taking charge of the job means to find the boat, put a buoy on her and raise it, and if I found the boat I would get the United States Government to put a buoy on it. I would put only a temporary apparatus on.

Our man, Taylor, put a buoy on it, on the 20th the only buoy he ever put on. That chanced to stay there till the 5th of March. Our buoys are not just the same as the Government's. The difference is this: a Government buoy is a larger buoy, very much larger buoy, and it is painted. Our buoy is 35 feet long. The water up there is 18 feet deep, so it sticks up out of the water some considerable distance. I did not have a conversation with Mr. Egerton over the telephone within a few days after the sinking of the Hiawatha, in which he told me his boat, the Hiawatha, had sunk. He might have called up at my office, but did not talk with me. I don't think Mr. Egerton ever talked with me at all. I can't remember Mr. Vail ever talked with me. He says he did, and he is a truthful man, but I can't remember. I can't recall the conversation he had with me.

We found out the Hiawatha had sunk through general in-

92 formation. We weren't asked to raise the Hiawatha.

Q. Were you asked by Egerton, Vail, or anybody else if you didn't know what wreck it was that sunk off Fort Lee?

A. I don't remember they had that conversation with me; I can't remember it. I can't say they did not; I don't remember they did. in any other conversations I had with Mr. Hill, February 15th, when I learned of the sinking of the Hiawatha, I don't think I ever told Mr. Hill the Hiawatha had come down on the wreck. I don't think I said anything about it. I offered to go with Mr. Hill to Mr. Lockwood. I don't know that I suggested going to Lockwood. I think he asked me to go with him. Mr. Hill knew about Mr. Rogers before I told him. He knew about the office. I think he knew there was such a department as that. He asked me to go and introduce him and I went down and had this talk with him.

Q. Did you say your buoys had been washed away?

A. I didn't tell him anything of the kind. We didn't put a buoy down, not until the 19th; then, I should say——

Q. You did put a buoy on the 19th?

A I never used such an expression, washed away. The buoy was put down on the 19th or 20th; 20th, I guess. In Col. Lockwood's office I certainly did not tell a story about the buoys being washed away. I used this expression. I said it was usual to have our buoys carried away, not washed away. You will have to alter it a little.

Q. "Q. Did you remember the fact that it was telephoned over by Mr. Hill when you were there"—this is referring to the con-
93 versation with Col. Rogers—you came back from Lockwood's office and went to Hill's office?

A. I don't think I did go back to his office. I don't remember having telephoned over to Col. Rogers; I don't think I said a word to Col. Rogers about it. I don't remember sitting there when Hill talked over the telephone.

Q. "Q. Do you remember the fact that it was telephoned over by Mr. Hill when you were there that the following information—'we further understand that they'—referring to you, the Baxter Wrecking Company—have readily put out a spar buoy, but that each time the ice comes down the buoy was carried away." Were you present?

A. Yes.

"Q. Did you give that information to Mr. Hill that your buoys were carried away?

A. I did, yes."

Q. Refreshing your recollection can't you say you were present at Col. Rogers'?

A. I don't remember that part of it. Of course I do remember distinctly the interview we had with Col. Lockwood, because I introduced him to the colonel.

I still think I did suggest going to Lockwood because I don't think Mr. Hill knew anything about him. I don't think he knew there was any Col. Lockwood there. He did know about this department. Every boatman knows about the Army Building I didn't think he knew about Col. Lockwood. He knew about the Army Building.

Q. You got the information from Mr. Cartwright the very next day after the Macy sunk, did you not, she was a thousand feet off and a little below the powder dock?

A. I don't think that I did get that—the Macy, just from Mr. Cartwright. That is where I found her. The first order I
94 gave to Captain Taylor was to take his wrecking barge. That was on the 18th. I did not have any boat up there in the neighborhood of Fort Lee. I did not send any boat up there at any time between the 12th and 19th. And in my opinion it would have been utterly useless to send a steamer up there and put a buoy on that wreck in those times. This wreck had to be found. I won't say it was utterly impossible to find that wreck between the 12th and the 19th, but I say I called your attention to what we would have to do to find the boat. We would have to sweep for it. With the ice conditions that were in the river, I don't think it was a practicable thing.

By the COURT:

I will describe what is meant by sweep. When there is no ice in the river, when it is water free, we use small boats—drag—or little gasoline boats, but when the conditions were as they were there, we would have required two tugboats to sweep for that boat. They sweep by using a drag line; a long sweep line fastended on each end of one boat to the other, and then they drag left and right, at a distance apart of about five or six hundred feet, or more.

By PLAINTIFF'S COUNSEL:

Q. If there had been any fenders sticking up there that would have been pretty good evidence the boat was there without sweeping?

A. Yes, I guess they were there, too.

If we had gone up there we could not have located the boat with ice running. If the ice wasn't running—we had no reason to presume anything of the kind at all. To locate that boat we would have to do just as we always do, sweep for the boat. The conditions weren't good. We could have raised the Hiawatha in as many hours as it took days to get this other boat. She is a good boat; a little tugboat, and the barge—coal barge—had about 400 tons of coal in it.

Q. If he went up and raised the Hiawatha in three hours, will you tell us why you couldn't have gone up and found this boat, the Macy?

A. It is because as I told you, from the best information we had, we would have to sweep for it. We rested upon that information. We have only one tug of our own. I can't tell you now what she was doing on the 13th.

On redirect examination:

When I finally went up there and put a buoy down, that buoy was for our own benefit, I should have to say, and not the benefit of the plaintiff in this action. That was so that when the weather compelled us to put away, we could go back and find the wreck.

Q. When you finally did start to go up there, your idea was to complete the whole job, was it not?

Plaintiff's COUNSEL: I object to what his idea was.

The COURT: Yes, sustained.

Q. You never went up there for the purpose of finding the boat irrespective of doing the job, did you?

Plaintiff's COUNSEL: Same objection.

The COURT: Sustained.

Defendant's COUNSEL: Exception.

Q. You never made any effort independently to find the boat, did you?

A. No, sir. Whatever I did was done in conjunction with the boat.

96 LEWIS F. PECK, called and sworn as a witness on behalf of defendant, testified as follows:

On direct examination:

I am employed by the Baxter Wrecking Company, and have been since the second of May, 1870, almost forty years. I was in the office the 12th of February, 1907. Mr. Baxter was there. I remember answering the telephone on that day. The man on the other end said he was Mr. Hill. He called up; I said, "Who is it?" he said, "Mr. Hill." "Is this the Baxter Wrecking Company?" "Yes, sir." "I have a boat sunk; I would like to talk to Mr. Baxter, if he is there." I said, "Yes, I believe he is here." I said, "Where is it?" "Off Fort Washington Point." Mr. Baxter came in and he went to the telephone. On the following day I heard Mr. Baxter say, "Who is this?" "This is Mr. Hill." I suppose he said Mr. Hill. He said, "I am Mr. Baxter," and then Mr. Baxter says, "Oh, a boat sunk? Where is she?" Mr. Baxter answered, as Mr. Hill had said on the other end Fort Washington, Mr. Baxter said, "How many tons of coal?" He said, "About 400." Asked the name of the barge. He said the barge Macy. I made a memorandum at the time.

It was Fort Washington. I was in the office on the next day. Mr. Baxter said over the telephone he could do nothing while the ice was running; the river was full of ice. I answered the telephone during that same day, in connection with this, he ordered me to call up the Cornell Steamboat Company, which I did; got a gentleman who said he was Captain Cartwright, who was in charge of the office. Mr. Baxter asked me to call the Cornell Steamboat Company to get information. I told Mr. Cartwright that Mr.
97 Baxter would like to talk to him. He asked him, "I would like to see the Captain of the Terry." I went back to the telephone later and called Mr. Hill up, and said Mr. Baxter just had been talking to Mr. Cartwright, and he had been informed he could see the river as far as Yonkers, and be no use to see the Captain of the Terry, because the river would be so full of ice they could do nothing. I talked the next day with Mr. Hill. He asked me about the job. I told him we had done nothing on account of the ice, and I put Mr. Baxter on the telephone, and he finished the conversation. He told him the same thing, he was unable to do anything on account of the ice. That continued for a number of days. I recollect Mr. Baxter telling Mr. Hill over the telephone he better get the Government to place a wreck buoy there. I think it was on the next day after the boat was sunk: I am quite positive it was. I think it was prior to the time the Hiawatha sunk. Mr. Baxter said over the telephone: "It is your duty as owner of the boat to see the boat is buoyed, and I shall recommend you to call up the Government and get them to put the buoy on," and he gave them the telephone number to call up at Tompkinsville, Staten Island. I don't recall any further conversation between Mr. Hill and Mr. Baxter that same day. On succeeding days, day after day, the same answer; unable to do anything on account of running ice in the river.

On cross-examination:

I am a clerk down at the Baxter Wrecking Company. I have been working for them since May 2, 1870. I knew Baxter was brought in — the suit in the United States District Court. I understand he was sued in that action because he had not put a buoy on the Macy, or they claimed he had not. I knew the conversations I just stated, all these conversations, day after day. Many times I answered Mr. Hill myself. I was not up on the trial in the District Court of the United States. I was in the office every day. I don't remember whether or not I told Mr. Baxter back in April, 1908, what I have now told the jury. I didn't think anything about it at that time.

WILLIAM H. TIMMONS, called and sworn as a witness on behalf of defendant, testified as follows:

On direct examination:

I am the wreck master for the Baxter Company. I ultimately raised the barge Macy. I got up there on the 4th of March to raise her. I had pontoons there. I did not raise her that day. I worked on her that day somewhere about eight hours; eight or nine hours putting chains under her. I had divers there, pontoons and a gang of men. I also had a tug there. The vessels all told which I had there were two pontoons and a tugboat. When I left her that day I went down to Weehawken our headquarters. I went back next day. That finished the job; raised her, and moved her. There wasn't a great deal of ice at that time. I remember what the weather conditions were about the 12th of February concerning ice. On that day I was most of the time up around our headquarters at Weehawken. I have been in the business about forty years, and have been at Weehawken as my headquarters eight or nine years. And I am familiar with the tidal conditions and the weather and movement of the ice on the North River. I have seen it
99 under all conceivable circumstances. Off Weehawken on the 12th of February there was quite some ice. About the same the 13th. The 14th, I don't think there was quite so much ice. Between the 12th and 15th, speaking generally, there was ice every day. The weather was pretty cold, and making ice at night: every night, I think. From where my place is, at Weehawken, I can see up the river to Fort Washington Point. The place where the barge was sunk was almost opposite that. In my judgment, the conditions being as I have described them, between the 12th and 15th, it was not a practicable thing to attempt to raise the barge Macy.

On cross-examination:

The reason is because we couldn't hold our pontoons there on that wreck.

Q. How do you figure out they raised the Hiawatha?

A. About three hours' work.

Q. How long did it take to put the buoy down on the Macy?

A. All depends where you are, and what you have got.

I was not staying at Weehawken all the time, the 12th of February. I was all over, wherever we had a job. We had several jobs. We have one tugboat and six pontoons. I was manager of the whole fleet. I can't tell you just exactly what the fleet was doing on the 12th. They were busy. I couldn't tell you what they were doing on the 13th. I don't think they were all busy on that day. On the 13th I was around different jobs, wherever they might have been. I was at Weehawken part of the day, in the morning probably about two hours. On the 14th I wasn't at Weehawken at all.

100 I don't know just exactly where I was; I wasn't there on the 14th. I couldn't tell you just exactly where I was on the 15th. My opportunities for observing the ice conditions in the river up at Fort Lee were somewhat limited. They weren't quite so good as those of a man going up and down the river with a tugboat. I don't know but under the operation of a northwest wind, or wind in the West, but what the ice was over on the New York shore. It may have been and may not. It may have been all the way across. Mr. Baxter told me on the 13th we had an order to do the job. He did not tell me to do anything. I didn't start to go up until I seen the pump up there; that was on the 19th; I think somewhere in that neighborhood. I hadn't done anything at all between the 12th and the 19th. Baxter told me to attend to the job. He meant we should locate and find the boat. Nothing said about buoying her.

Q. You were asked this question: "Q. Did Mr. Baxter give you any orders at any time to locate the wreck?

"A. He told me to attend to the wreck.

"Q. What did that mean?

"A. To do all the work—to find her, to buoy her if necessary, and to get her up, the whole thing."

That is about what attending to the wreck means, isn't it?

A. Yes.

The only difference between our buoys and Government buoys is that ours are painted, and theirs are not; that is about all the difference there is. Captain Taylor put the buoy there, on the 20th, I think it was. I went up there the 4th of March. I was working there the 4th and 5th, and that buoy was still there then.

101 I cannot tell you what we were doing between the 12th and the 19th, what job we were working on. I am not able to state my plant was working on all days except part of the 13th; I can say I was ready to go to that job any time the weather was fit.

Q. You testified at the trial before as follows:

"Q. I want to know first where you were working. How many of those places were there during that period of time?

"A. Four or five different places.

"Q. You were working on a coal boat at 30th Street, North River, were you?

"A. Of course I had nothing to do with that." Who was doing those jobs?

A. Captain Taylor done those two jobs. I don't know what I was doing.

Q. "Q. Tell me something you had to do with on the 4th and 5th?
"A. We had a wreck off the end of Governor's Island, we were raising that.
"Q. What kind of a wreck?
"A. A barge with 700 tons of soft coal."
Q. Were you on that job?
A. I was there part of the time; yes, sir.
Q. If you are the superintendent, when work is going on by the Baxter Wrecking Company, do you go around to the work?
A. No, I go around wherever the case calls me for. I don't stay around the place all the time.

On redirect examination:

When I said attend to the wreck, find, buoy and raise her, I mean by buoying her, of course, buoy the wreck as we find her. The purpose of our wrecking company putting buoys on the wrecks is, in case we have to go away, so we can find the wreck again. Mr. Baxter didn't give me any orders to buoy any wreck.

102 On recross examination:

Most of the reason we put a buoy on a wreck is to enable us to find it. The rest of the reason is to keep anybody from running on her, of course.

Defendant's COUNSEL: I want to read from the testimony of Emery something about the weather conditions. Page 33: "Commencing with the 5th of February, the temperature ranged between 20 and 14 degrees—20 degrees the highest and 14 the lowest.
"February the 6th, the highest temperature on that day was 19, and lowest 11.
"On the 7th, highest temperature 23 and lowest 11.
"On the 8th, highest 30, lowest 18.
"On the 9th, highest 31, lowest 19.
"On the 10th, highest 43, lowest 28.
"On the 10th, highest 35, lowest 6.
"On the 12th, highest 16, lowest 1.
"On the 13th, highest 31, lowest 9.
"On the 14th, highest 44, lowest 28.
"On the 15th, highest 35, lowest 22.
"On the 16th, highest 41, lowest 25.
"On the 17th, highest 39, lowest 15.
"On the 18th, highest 32, lowest 13.
"Q. Please tell us the ice conditions as observed by you in the North River on February 12th, 1907?
"A. On February 12th, floating ice observed in the North River. On the 13th, large quantities of floating ice observed in the North and East River and Upper Bay. On the 14th, small quantities of floating ice in North and East River and Upper Bay. On the 15th, small quantities of floating ice in North and East River. On the 18th, small quantities of floating ice in the North and East River.

"Q. What on the 16th and 17th?
"A. Nothing else.
"Q. You have no records of observations for the 16th, 17th and 19th?
"A. There was no floating ice on those days.
"Q. Does your record show the temperature?
"A. There might have been some in the slips, I don't know anything about that, in the River, I don't think the observations would cover the slips; I mean the ferry slips."

Defendant's counsel then read from the printed record in the United States District Court as follows, from page 38:

"Q. The extent of ice in the rivers here then is not dependent upon, nor does it follow, the local conditions?
"A. No.
"Q. As to weather and wind?
"A. No. As to wind where it is drifting it.
"Q. The amount of floating ice around this river depends upon conditions not local at all?
"A. Not local at all.
"Q. It may be very mild and delightful weather here and the East and North River be full of ice at the same time, or the North River?
"—. The temperature might rise very rapidly here, it would have to rise very rapidly to have warm weather here and ice in the river.
"Q. In other words, the ice that is produced and comes down the North River is a result of conditions that exist up river and not here?
"A. Yes, sir, not here."

DEFENDANT'S COUNSEL: Page 29: "February 12th, 1907, from 7 A. M. to 9 A. M., the prevailing direction was west and north-
104 west until 11 A. M. Pages 31 and 32, we get the velocity. Page 35 gives us the minimum and maximum velocity of the wind.

Defendant's case was thereupon rested.

JAMES A. HILL, recalled as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

On direct examination:

It is not so that Mr. Baxter, after I called him up on the telephone, told me in the course of that conversation, he wouldn't undertake to do the work. The actual word he said was he would go on the job at once. I never had a talk with Mr. Peck over the telephone at all, to my knowledge.

Q. Mr. McLeod has testified that you asked—after employing the Baxter Wrecking Company to do this work here, you went to him and asked the Merritt & Chapman Wrecking Company to put a buoy on the boat; is that so.

DEFENDANT'S COUNSEL: I object as not proper rebuttal.

THE COURT: Counsel asked that question and laid the foundation.

He was asked whether he didn't go to the office of the Merritt & Chapman Wrecking Company, and Mr. McLeod, you remember, was asked to stand up. You remember that?

The WITNESS: Yes.

By the COURT:

Q. You were asked if you had a talk with him?

A. And I replied no. I had never been to the Merritt & 105 Chapman Wrecking Company in my life. I don't know where their offices are. I have never employed them at all at any job. I attempted to employ them one year after the Macy sunk. I sent Mr. Warford.

FREDERICK A. EGERTON, called and sworn as a witness on behalf of the plaintiff, in rebuttal, testified as follows:

On direct examination:

Q. I will ask you if you had any conversation with Mr. Baxter after the 15th of February, 1907, in regard to the sinking of the Hiawatha?

DEFENDANT'S COUNSEL: I object if your Honor please, as incompetent. It surely is not rebuttal.

The COURT: The question put to this witness was, did the state to Mr. Baxter when he had been advised that he had some employment to locate and raise—go on and put your question.

A. You mean the 15th?

Q. The 14th of February. After the 14th of February?

A. I did. After the 14th I telephoned to Mr. Baxter's office at least two times, and possibly three times. I got Baxter at least two of those times.

Q. Tell us what Baxter said, and what you said?

DEFENDANT'S COUNSEL: I make the same objection.

The COURT: My recollection is refreshed; he made the same answer; he was sure he had Baxter on two occasions. Let him answer.

106 A. This was after the 14th?

Q. Yes.

A. I called up Mr. Baxter's office and asked him if he knew of any wreck in the vicinity of the powder dock at Fort Lee.

Q. Yes, what did he do?

A. He replied he did not.

DEFENDANT'S COUNSEL: I move to strike it out as incompetent, irrelevant and immaterial.

The COURT: No, let the answer stand.

DEFENDANT'S COUNSEL: Exception.

A. I then asked if he heard of any such thing, would he kindly inform me, and he said he would. That was the substance of that conversation. That was the substance of all the conversations I had, Friday and Saturday, the 15th and 16th; that is the substance of them.

Q. The last conversation with him, you called him up and told him the name of the wreck Macy, told him the name of the boat?
A. Mr. Vail did.

On cross-examination:

I called Baxter up the first time on the 14th, that is after the Hiawatha sunk, to ascertain if he was in a position to handle the wrecking of the Hiawatha. Afterwards I called him to give the name of the barge so I could make a survey on it. That is the only reason I called him up, other than asking about wrecking the Hiawatha. I had two objects in view. That was in order to serve the owners with copies of the survey, to hold the owners.

The following stipulation was made by the parties:

107 1. That the decision of the United States Circuit Court of Appeals for the Second Circuit in the suit of Frederick A. Egerton, et al. against the canal boat Macy and John F. Baxter was handed down May 25th, 1909.

2. That by the rules and practice of said Circuit Court of Appeals the mandate is issued as of course, ten days after the decision.

3. That within such ten days the Buchholz-Hill Transportation Company, claimant and appellant in said suit, applied to said Circuit Court of Appeals for an order directing that the affirmance of the decree of the District Court should state that the same was without prejudice to the bringing of a new action by said claimant against John F. Baxter for the relief prayed for in its petition against said Baxter.

4. That said Baxter by his counsel opposed such application and submitted a proposed order for mandate affirming the decision of the District Court and dismissing the petition of Buchholz-Hill Transportation Company upon the merits and without stating that the same was without prejudice to such action against Baxter.

5. That on June 16th, 1909, said Circuit Court of Appeals made the order for mandate which appears at page 160 of this record.

6. That the issues in the suit aforesaid in the United States Circuit Court of Appeals are the same as those of the case at bar.

The testimony in the case was then closed.

DEFENDANT'S COUNSEL: I renew the motions made at the close of the plaintiff's case, and on the grounds further that there is
108 no credible evidence in this case that the minds of the parties ever met sufficiently to send the question to the jury.

THE COURT: Motion to dismiss is denied.

DEFENDANT'S COUNSEL: Exception.

Charge to Jury.

Counsel for both parties having summed up to the jury the Court charged the jury as follows:

GENTLEMEN: The Macy, it appears, sunk on February 12th, 1907, at 8:30 in the morning, and notice of that fact was brought the same day, the same morning, to its owner, the plaintiff here, the

Buchholz-Hill Transportation Company. It thereupon became the duty of the Buchholz-Hill Transportation Company, as the owner, to immediately mark the wreck of its boat with a buoy, or beacon, during the day, and a lighted lantern at night. Of course, the law does not expect impossibilities, and when the statutes requires a buoy, and, if you please, a light at night, it assumes that the conditions are such that that can be done, and if it cannot be done immediately, then at the first seasonable opportunity. There shall be no delay. Not that there shall be no reasonable delay, but there shall be no delay, conditions permitting.

The second day after, the Hiawatha sunk by coming in contact with the wreck of the Macy. That was on the 14th of February, at 3 o'clock in the afternoon. You have the testimony here as to what the conditions were at that time. You have the testimony of the witnesses as to whether or not there were fenders. You have the situation given to you by them, and it will be for you to say whether at that time the boat was buoyed; for, if it was not buoyed,
109 and it could have been buoyed in the meantime, that is, between the sinking of the Macy and that of the Hiawatha. then, of course, as found in the Federal Court, the Buchholz-Hill Transportation Company was liable.

You have here to deal with the claim of the Buchholz-Hill Transportation Company that, by reason of the defendant's negligence, it was made liable for this damage that followed, the damage consequent to the sinking of the Hiawatha.

Plaintiff says that on the 12th day of February, an oral contract was entered into with the defendant, whereby the defendant as a result was to raise the Macy. Plaintiff's president says that the defendant was to locate, buoy and recover the boat. The defendant says that the conversation was to recover the boat.

There is somewhat of a sharp conflict between the parties as to what was said, and as to what that contract was. That contract of employment, like every other contract, to be effectual, and to be valid, must represent the meeting of the minds of the parties. There must be a concurrence of the minds; the minds must agree upon the essential elements. Otherwise there is no agreement, and, hence, the word "agreement," that they have agreed.

Among the first questions for you to consider here will be, What was the agreement? What was the contemplation of the minds of each, and on what did their minds concur; for, among the questions for you to determine will be whether it was within the contemplation of the mind of Hill that this defendant was to undertake the plaintiff's burden of buoying that wreck, as required by law. Whether that was the buoying contemplated, or whether it was first to locate (and, of course, to buoy would mean to locate), and
110 then for the purpose of recovery, for the purpose of recovering locate a buoy.

You see there is where the contention is between these two litigants. What was in the mind? What was in contemplation? Did the minds of the parties meet upon the suggestion that the defendant was to do the buoying, which it was for the owner of the Macy

to do? You have the testimony here, and from that testimony it will be for you to determine what was said and what was agreed to, what the contract between them was.

Plaintiff by its complaint alleges that the defendant entered into this contract, and that despite its obligations the defendant did not exercise reasonable diligence in the location and buoying of and raising of said wreck, and did not promptly and diligently locate and buoy said wreck, although the conditions were such that it could, with the exercise of reasonable diligence, have been done.

Negligence is that inadvertent act of omission, or it may be an act of commission, that under the same conditions and circumstances ordinary prudence and caution would forbid. Consequently, the defendant here was burdened with the exercise of that degree of care which an ordinary prudent man would have exercised under those conditions.

Determining what his contract was, then you will go into the next question, whether there was any negligence on his part. Before you enter upon the question of negligence, it will be necessary for you to find that the contract entered into contemplated, expressed and included, the duty of the plaintiff to obey the mandate of the statute, though that was not said between them. I have read it to you intentionally, so you might the better understand it. If that was within the contemplation of the parties, if they did so agree, then, what was the conduct of the defendant? Was the defendant guilty of
111 any negligence which resulted in the sinking of the Hiawatha, and hence the damage to this plaintiff?

You are not to be moved in anywise alone from the fact there has been a recovery against the plaintiff by the owner of the Hiawatha. Not that alone, because unless plaintiff makes out his case by a fair preponderance of evidence as to all the other questions, there can be no recovery here.

What was the condition of the river? Was it crowded with ice? Was the sinking of the Hiawatha due to the condition of the river, and being crowded with ice at that time? If so, how long had that condition existed? How long did it continue? Could, in the exercise of reasonable prudence and care, if such was the duty of Baxter, he have performed his employment to buoy the boat? Could he have located it, because to buoy, as I have remarked to you before, of necessity includes first the locating of the wreck, for there could be no buoying before it was located.

What was the situation? Was there any negligence on his part? He was burdened with the exercise of ordinary prudence and care, and that only. He was not an insurer. Even if you find that he entered into this contract, he did not insure the plaintiff. If you pass those questions, then the remaining question, if you find all in plaintiff's favor, will be that of damages, which will be a very easy one for you to determine, since we will advise you as to that.

You have had these witnesses before you. You have seen them, and you have had their mannerisms of testifying. You will determine first what weight and credence you shall give to each. Was there anything in the testimony of any witness that created a doubt

of candor in your minds. Any witness? Was there any
112 witness called here having an interest in the result of the action, whose testimony created a doubt in your minds as to the probability of its truth? This applies to all the witnesses. It is general. How easy it is, indeed, at times to determine the want of sincerity of speech. Possibly, some of you have, at times, in passing along the street, or in your places of business, or elsewhere, upon hearing a remark from one whose face was not within your view, hesitated a moment, and have concluded that it was not true. There has been something about it that has impressed you as being improbable. I have never seen any explanation for it, but it is some influence upon the tympanic nerve which indicates that which we shall doubt.

Take all this testimony and scrutinize it closely, and determine just what the facts are. Determine just what this contract was between these two, for when you have determined that, you have then determined the great question in the case.

With the consent of counsel, the Court will submit to you questions which the counsel have agreed upon. It is fair to counsel I should say to you that the Court suggested the submission of these written questions to you, to the end that in making your answers you may possibly better reach a result upon each separate question, and then leave for consideration afterwards the general verdict to be had in this case.

The first question is this: Was there on February 12th, 1907, an oral agreement between plaintiff and defendant in relation to the barge Macy? That question, in my opinion, from the evidence in this case, you may well answer yes, there was an oral agreement between them.

Second. Did that contract contemplate and include the
113 locating of the barge Macy? That will be for you to determine from this evidence, and hence, your answer to that will be yes or no, whichever your conclusion may be.

Third. Did that contract contemplate and include the raising of the wreck of the barge Macy? Likewise, will you answer that categorically.

Fourth. Did that contract contemplate and include the buoying of the wreck of the barge Macy for plaintiff and that the same should be so done by defendant in discharge of plaintiff's duty to so buoy? You must fully appreciate that question. That does not involve the buoying for the purpose of afterwards raising. That involves the buoying for notice to those who are using the waterway, the navigable channel. If you find the last question in plaintiff's favor, then:

Fifth. Was the defendant negligent in the performance of the contract as you find it to be?

Sixth. Were the sinking of the tug Hiawatha and the consequent damage due solely to the negligence of the defendant in performing said contract? These questions may be all answered categorically.

Gentlemen, appreciate, if you will, the importance of reaching a correct conclusion here. As I have said to you, the burden is upon the plaintiff to make out its case by a fair preponderance of evidence.

That burden is with it upon every question in the case. By a fair preponderance of evidence is not meant the greater number of witnesses. It does not refer to the volume of testimony. It refers to the quality of the testimony. In other words, that with evidence of a believable character, with evidence having probative force,
114 your minds are led to the conclusion that the facts are as it has laid them, not otherwise, and if the plaintiff upon any question has failed to bear that burden, then it fails in its case here. If the plaintiff leaves your minds in doubt as to any question, then it fails here.

The rule is not on the civil side of the Court as it is on the criminal side, that a proposition must be proven beyond a reasonable doubt. That is not the rule here, but the rule is here that a plaintiff asserting a proposition must establish it by a fair preponderance of proof, which means nothing more or less than tilting the scales in its favor; that weight of proof, of believable evidence having probative force is in its favor.

I think you understand plainly what I have intended to say. I have endeavored to make it plain to you. You take this case. Do justice as between these parties, for, you probably have heard me say before, that you occupy a very important position. Think of it, if you will, any one of you having a difference with another, were to submit that difference to arbitration or to the conclusion of another, what would you expect? You would expect fairness, you would expect justice, so far as it was within the conscience of the man to give it to you. That is expected of you here. Do as your obligation requires of you. Not until you have satisfied that will you have properly performed your duties as jurors.

Gentlemen, take this case. Do justice as between these parties, and before committing it finally, I should say to you this, that you are not to infer from any remark of the Court the expression of any opinion on any of the facts in the case. A Court should not intimate its opinion to you, and, hence, you are not to infer any
115 such opinion on the facts in conflict, from any statement of the Court. You must take the law from the Court; not from counsel, and finding the facts, then you apply the law as you have listened to it from the Court.

Gentlemen, I will defer the other question, if you so consent, until the jury return their verdict in the morning, and then take a general verdict as to the question remaining open. Do you so consent?

Plaintiff's Counsel: We do.

Defendant's Counsel: Yes.

The Court: When you have reached your conclusions as to these questions, you will answer categorically under each, and then on the other page sign the names, each one signing his name, have you any requests?

Plaintiff's Counsel: None.

The Court: Any exceptions?

Plaintiff's Counsel: These two exhibits, I would like your Honor to advise the jury they can take them with them if they want them.

The Court: If the other side don't object.

The jury retired.

A sealed verdict was ordered.

The jury found a verdict for the plaintiff.

The jury was polled.

Plaintiff's COUNSEL: The general verdict I suppose should be taken?

The COURT: Yes.

Plaintiff's COUNSEL: I move for judgment.

The COURT: Agreeable to the stipulation of yesterday that the general verdict as to the amount of damages to be assessed, should be deferred until this morning, on the coming in of the verdict upon the separate questions, and the amount of the damages having been stipulated, that is the consequent damages to the Buchholz-Hill Transportation Company because of the sinking of the Hiawatha at $5,579.52, the Court now directs, in view of your answers to the separate questions submitted, that you find a verdict for the plaintiff for $5,579.52.

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Defendant's COUNSEL: I move to set the verdict aside on the ground it is against the law, the evidence, the weight of evidence, and all the grounds specified in Section 999, and in connection with that, unless your Honor has fully determined all the questions presented here, I would ask your Honor to hear me on these minutes before finally deciding.

Plaintiff's COUNSEL: I make a motion the jury be instructed to return a general verdict.

The COURT: I directed a general verdict.

Defendant's COUNSEL: Exception.

PLAINTIFF'S EXHIBIT 1.

Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of Frederick A. Egerton and Augustus Demarest, owners of the steam-tug Hiawatha against the canal boat Macy, her tackle, apparel and furniture and against any and all persons having or claiming to have any interest therein in a cause of collision, civil and maritime, respectfully shows:

First. That the said canal boat Macy together with her tackle, etc., is now within this district and within the jurisdiction of this Honorable Court.

Second. That your libellants now are and at all of the times hereinafter mentioned were the owners of the steamtug Hiawatha, her engines, boilers, tackle, etc., and that up to the time of the happening of the collision hereinafter set forth, the said steamtug was in all respects tight, strong, staunch and seaworthy and properly manned and equipped.

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Third. Upon information and belief that heretofore and on or about the 14th day of February, 1907, at about 1 P. M., on said day, the steamtug Hiawatha left 184th Street, Harlem River, New York City with the canal boat Lizzie Harvey in tow, the said tug and tow

being bound for Morris Canal Basin, Jersey City, New Jersey. That at the time the tide was ebb; the wind from the West and the day clear. That said tug and tow proceeded down the Hudson River in about the middle thereof under a hookup bell, until the said tug and tow were about opposite Fort Lee. When the said tug and tow were about opposite the said Fort Lee, the tug Hiawatha suddenly struck or ran upon a submerged object which afterwards proved to be the canal boat Macy. That in striking and running upon the said Macy, the said Hiawatha broke three planks in her bottom; her propeller and tail shaft and sustained other and considerable damage and despite the efforts of her crew to keep her afloat, the said steamtug Hiawatha filled and sank. That the tugboat Hiawatha and those in charge of her had no knowledge or information of the presence of the said canal boat Macy and had no knowledge that the said Macy had been sunk at the said place.

Fourth. Upon information and belief that there was no
118 beacon, buoy or other signal placed over the spot where the said Macy was lying to warn navigators of the presence of the said canal boat Macy in the channel, the said Macy being completely submerged.

Fifth. Upon information and belief that the said collision and consequent damage were not caused by any fault, neglect or want of care on the part of the steamtug Hiawatha or those in charge of her, but was caused solely through the fault, neglect and want of care on the part of those in charge of the canal boat Macy more especially in the following particulars:

1. In that those in charge of the said canal boat and her owners failed to comply with Chapter 425 of the Laws of 1899; Section 15 of the United States Statutes at Large, and that they did not immediately mark the place where the canalboat Macy sank.

2. In that the owners of the said canal boat Macy or those in charge of her, failed to keep and maintain a suitable beacon, buoy or other warning upon the sunken vessel; and in such other and further particulars as the libellants will point out on the trial of this action.

Sixth. That by reason of the collision your libellants have sustained damages in the raising of the said tug; for repairs; for loss of time while undergoing said repairs; for towage; loss of equipment; for tug hire; surveyor's fees, etc., in the sum of Five thousand three hundred fourteen and 55/100 Dollars ($5,314.55), no part of which has been paid although payment thereof has been demanded.

Seventh. That all and singular the premises are true and
119 within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your libellants pray that process in due form of law, according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said canal boat Macy, her tackle, apparel and furniture and against all persons having or claiming to have any interest therein; and that they may be cited to appear and answer under oath all the matters aforesaid and that this court may be pleased to decree to the libellants the

amount of their damages with interest and costs; and that the said vessel may be condemned and sold to pay the same; and that your libellants may have such other and further relief as to the Court shall seem just.

FOLEY & MARTIN,
Proctors for Libellants, #71 Wall Street,
Borough of Manhattan, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Frederick A. Egerton, being duly sworn, says that he is one of the libellants herein; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

FREDERICK A. EGERTON.

Sworn to before me this 10th day of May, 1907.

F. M. LAWRENCE,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

[Endorsed:] Libel filed Dec. 12, '07.

120 PLAINTIFF'S EXHIBIT 2.

Answer of Buchholz-Hill Transportation Company.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Answer of the Buchholz-Hill Transportation Company, claimant and owner of the barge Macy, her tackle, etc., to the libel and complaint of Frederick A. Egerton, in an alleged cause of collision, civil and maritime, alleges:

First. Said claimant admits the allegation contained in the first paragraph of the said libel.

Second. The said claimant denies that it has any information as to the truth of the allegations contained in the second paragraph of the said libel and leaves libellant to the proof thereof.

Third. Said claimant denies that it has any information as to the allegations contained in the third paragraph of the said libel, except that claimant is informed that the tug Hiawatha struck the wreck of the barge Macy.

Fourth. Claimant admits that no beacon or buoy was placed over the wreck until after the accident to the Hiawatha.

Fifth. Claimant denies the allegations contained in the fifth paragraph of the said libel.

Sixth. Claimant admits that the said tug Hiawatha was damaged, but is ignorant of the extent of said damage and leaves libellant to the proof thereof.

Seventh. Claimant admits the jurisdiction of this court, and denies the remaining allegations in the libel.

121 Eighth. Claimant alleges that on the 12th day of February, 1907, the tug Edwin Terry, belonging to the Cornell Steamboat Company, took in tow at the foot of 48th Street, North River, claimant's coal barge Macy, bound for Yonkers, N. Y., said tug leaving foot of 48th Street about 5 A. M.

The North River was full of heavy ice and when off about Fort Lee, claimant is informed that the tug's propeller became foul with the hawser and the boat Macy run upon the stern of the said tug and stove in the bow of the Macy, causing her to leak so that she sank in about 15 minutes. Every possible effort was thereupon made by this claimant to locate the said wreck for the purpose of buoying the same to prevent her becoming a menace to navigation, and to that end claimant employed a competent wrecking company, to wit, the Baxter Wrecking Company, to locate and buoy said wreck, but as claimant is informed on account of the ice conditions in the river and said wreck being wholly submerged, it was impossible to locate or buoy her before the accident to said tug, and claimant alleges that any damage alleged to have been caused by said tug Hiawatha striking the said wreck was in no wise due to any neglect on the part of the claimant.

Claimant alleges that the said coal barge Macy, at the time she was bound on her said trip to Yonkers, was properly manned and equipped and was, in all respects, staunch and seaworthy.

That the value of the said Macy after the said sinking, together with her freight, did not exceed One thousand Dollars ($1,000.00).

That the said collision with the Hiawatha, was not caused in any wise by the fault of the said Macy or any member of the

122 crew and the said loss and damage was done, occasioned and occurred without any fault on the part of the said claimant and without its privity or knowledge.

Ninth. That claimant has filed a stipulation for value herein in the sum of Fifty-six hundred Dollars ($5,600.00) with the proviso that the same shall not be enforceable beyond the amount of the liability of said claimant, in case it be determined in this case or any proceeding to limit the liability that the claimant is entitled to the provisions of sections 4283, 4284, 4285 of the Revised Statutes of the United States and the Acts Amendatory thereof.

Tenth. Claimant further alleges that the terms stated in said libel do not constitute a claim or lien in rem against the said boat.

Wherefore claimant prays that said libel may be dismissed with costs.

ARMSTRONG, BROWN & BOLAND,
Proctors for Claimant, Office & Post-office Address,
71 *Nassau Street, Borough of Manhattan,*
New York City.

[Endorsed:] Answer. Filed Feb. 3, 1908.

123 PLAINTIFF'S EXHIBIT 3.

Petition to Bring in Baxter.

United States District Court for the Southern District of New York.

FREDERICK A. EGERTON and AUGUST DEMAREST, Owners of the Steamtug "Hiawatha," Libellants,
against
THE CANALBOAT "MACY," HER TACKLE, &c.; BUCHHOLZ-HILL TRANSPORTATION COMPANY, Claimant.

Petition under 59th Rule in Admiralty.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The petition of the Buchholz-Hill Transportation Company alleges as follows:

First. That your petitioner at all the times hereinafter stated was and now is a corporation organized under the laws of the State of Pennsylvania, and at such times was and now is the owner of the barge Macy, her tackle, etc.

Second. That on or about the 12th day of December, 1907, a libel was filed in this court by Frederick Egerton and August Demarest, as owners of the steamtug Hiawatha against the said boat Macy, to recover the sum of $5314.55 as damages caused to said tug by running upon the wreck of the "Macy," which had sunk off Fort
124 Lee in the Hudson River, the sinking occurring on February 12th, 1907, and the collision with the said wreck on February 14, 1907. Your petitioner has duly appeared in said case and has filed claim to the said boat Macy, and has given the necessary stipulation for costs and value.

Third. The circumstances of the said damage were as follows:

On February 12th, 1907, the tug Edwin Terry, belonging to the Cornell Steamboat Company took in tow, at the foot of 48th Street, North River, petitioner's coal barge Macy, bound for Yonkers, N. Y., said tug leaving the foot of 48th Street about 5 A. M. The North River was full of heavy ice and when off about Fort Lee, petitioner is informed the tug's propeller became fouled in the hawser and the boat Macy ran up on the stern of the said tug and stove in the bow of the Macy, causing her to leak so that she sank in about 15 minutes. Thereupon petitioners engaged John F. Baxter, doing business as Baxter Wrecking Company, and being an entirely competent and responsible wrecker, to locate, buoy and raise said wreck.

Fourth. That John F. Baxter was immediately engaged for that purpose but either through adverse weather conditions or neglect on the part of the said Baxter the latter was unable to locate the said wreck for the purpose of buoying it until after the accident referred to in the libel herein.

Fifth. That your petitioners were informed by the libellants

herein that on or about February 14, 1907, about 1 P. M. of said day the steamtug Hiawatha left 184th Street, Harlem River, New York City with a tow and that in proceeding down the Hudson
125 River she ran upon the wreck of the said boat, Macy, damaging the said tug Hiawatha to an extent unknown to your petitioners.

Sixth. That said accident was not caused nor contributed to in any wise by any neglect on the part of your petitioners, but was either inevitable or else was due to the neglect or lack of skill of the said John F. Baxter in locating the said wreck, and justice requires that said John F. Baxter should be made a party to this action.

Seventh. Your petitioner has filed herein sufficient surety to pay the libellants or any new party brought into this action such costs, damages and expenses as shall be awarded against your petitioner by this Court upon its final decree, either in the original or appellate court, and herewith files its answer to the aforesaid libel.

Eighth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore your petitioner prays that a motion issue to the said John F. Baxter, citing him to appear and answer this portion of the libel herein, and that this court either dismiss the libel filed against the said boat Macy, or hold that the said John F. Baxter is responsible for the said damage and make such other and further decree in the premises as shall be just.

ARMSTRONG, BROWN & BOLAND,
Proctors for Petitioner,
71 *Nassau St., N. Y. City.*

[Endorsed:] Petition. Filed Feb. 3/08.

126 PLAINTIFF'S EXHIBIT 4.

Answer of Baxter to Libel.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The answer of John F. Baxter, impleaded with the canal boat Macy to the libel of Frederick A. Egerton and August Demarest, alleges as follows:

First. The respondent admits the first and second articles of said libel.

Second. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of article third of said libel.

Third. The respondent admits the allegations of article fourth of said libel.

Fourth. The respondent denies any knowledge or information sufficient to form a belief as to any fault, neglect or want of care on

the part of the steamtug Hiawatha, and admits the other allegations of article fifth of said libel.

Fifth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of article sixth of said libel.

Sixth. The respondent admits the jurisdiction of the Court and denies the other allegations of article seventh of said libel.

Seventh. Further answering, the respondent alleges as follows:

He is engaged in the wrecking business in the port of New York, and has been for over thirty years, last past.

On February 12th, 1907, he was informed by Mr. Hill, an
127 officer of the Buchholz-Hill Transportation Company, that the barge Macy, laden with a cargo of coal, bound to Yonkers, in tow of one of the Cornell Steamboat Company's tugs, had sunk in the Hudson River in the neighborhood of Fort Lee. Said Hill requested the respondent to raise and recover the barge and cargo if possible. The respondent at once applied to the Cornell Steamboat Company to send the master of the tug which had had the barge in tow to assist in locating the wreck. The employees of the Cornell Steamboat Company in charge of the matter informed the respondent that he would send the master of the tug Edwin Terry, but that nothing could be done until the ice had cleared. At that time the whole river was full of ice from shore to shore from 51st Street, N. R., up the river as far as Fort Lee.

On that day and every day thereafter the respondent was ready and willing to undertake the work, but the ice continued, making it impossible to get near the place where the barge had sunk until February 20th, when, having obtained the necessary information from the master of the tug Edwin Terry and the ice having somewhat cleared, the respondent sent the tug, F. N. Stinson, with a wrecking barge and lighter boat and found the wreck lying in 18 feet of water off the Powder Dock at Fort Lee.

The respondent was guilty of no negligence whatever in the premises. He never agreed or undertook to locate or buoy or raise the wreck except as the weather conditions permitted, and it was absolutely impossible for him to reach the wreck on the 12th of February or at any time thereafter prior to the accident mentioned in said libel. The respondent continued working on the barge as the
128 ice permitted, being driven away at times and resuming operations later, until March 5th, 1907, when the barge was raised and towed to Weehawken.

All and singular the premises are true.

Wherefore the respondent prays that the libel herein may be dismissed as against the respondent John F. Baxter, with costs.

JOHN F. BAXTER.

Sworn to before me this 16th day of March, 1908.

[SEAL.] JONATHAN H. HOLMES,
Notary Public, New York County.

WING, PUTNAM & BURLINGHAM,
New York.

[Endorsed:] Answer to Petition.—Filed March 19/08.

PLAINTIFF'S EXHIBIT 5.

Answer of Baxter to Petition.

United States District Court for the Southern District of New York.

FREDERICK A. EGBERTON and AUGUST DEMAREST, Owners of the Steamtug "Hiawatha," Libellants,
against
THE CANALBOAT "MACY," HER TACKLE, &C.; BUCHHOLZ-HILL TRANSPORTATION COMPANY, Claimant.

The answer of John F. Baxter to the petition of the Buchholz-Hill Transportation Company alleges as follows:

129 First. The respondent admits the first and seventh articles of said petition.

Second. The respondent admits the filing of a libel as alleged in the second article of said petition, but for the contents thereof, he begs leave to refer to the original. Further answering, he admits that the petitioner has appeared and filed a claim to the barge Macy and given stipulations for costs and value.

Third. The respondent admits that on February 12th, 1907, as also on the 13th and 14th, the North River was full of heavy ice in the neighborhood of Fort Lee. He admits that on February 12th, 1907, he was notified by the petitioner that the barge Macy had been sunk and was requested by the petitioner to recover the barge. He denies that the petitioner requested him to buoy said wreck. Further answering, he denies any knowledge or information sufficient to form a belief as to the other allegations of the third article of said petition.

Fourth. The respondent admits his engagement as aforesaid. He admits that owing to the heavy ice in the Hudson River it was impossible to locate the wreck of the barge Macy until February 20th, 1907. He denies each and every allegation of the fourth article of said petition imputing negligence to him of any sort.

Fifth. The respondent denies any knowledge or information sufficient to form a belief as to the allegations of the fifth article of said petition.

Sixth. The respondent denies each and every allegation of the sixth article of said petition charging negligence or lack of skill on the respondent in locating said wreck or otherwise. He denies

130 that justice requires that he be made a party to this suit.

Further answering, he denies any knowledge or information sufficient to form a belief as to the other allegations of the sixth article of said petition.

Seventh. The respondent admits the jurisdiction of the Court, and denies the other allegation of the eighth article of said petition.

Eighth. Further answering, the respondent alleges as follows:

He is engaged in the wrecking business in the port of New York and has been for over thirty years last past.

On February 12th, 1907, he was informed by Mr. Hill, an officer of the petitioner herein, that the barge Macy, laden with a cargo of coal, bound to Yonkers in tow of one of the Cornell Steamboat Company's tugs, had sunk in the Hudson River in the neighborhood of Fort Lee. Said Hill requested the respondent to raise and recover the barge and cargo if possible. The respondent at once applied to the Cornell Steamboat Company to send the master of the tug which had the barge in tow to assist in locating the wreck. The employees of the Cornell Steamboat Company, in charge of the matter, informed the respondent that he would send the master of the tug Edwin Terry, but that nothing could be done until the ice had cleared. At that time the whole river was full of ice from shore to shore from 51st Street, N. R., up the river as far as Fort Lee.

On that day and every day thereafter the respondent was ready and willing to undertake the work, but the ice continued, making it impossible to get near the place where the barge had sunk
131 until February 20th, when, having obtained the necessary information from the master of the tug Edwin Terry, and the ice having somewhat cleared, the respondent sent the tug F. N. Stinson with a wrecking barge and lighter boat, and found the wreck lying in 18 feet of water off the Powder Dock at Fort Lee. The respondent continued working on the barge as the ice permitted, being driven away at times and resuming operations later, until March 5th, 1907, when the barge was raised and towed to Weehawken.

The respondent was guilty of no negligence whatever in the premises. He never agreed or undertook to locate or buoy or raise the wreck except as the weather conditions permitted, and it was absolutely impossible for him to reach the wreck on the 12th of February or at any time thereafter prior to the accident mentioned in said petition.

All and singular the premises are true.

Wherefore the respondent prays that the petition herein may be dismissed with costs.

JOHN F. BAXTER.

Sworn to before me this 16th day of March, 1908.

[SEAL.] JONATHAN H. HOLMES,
Notary Public, New York County.

WING, PUTNAM & BURLINGHAM.

[Endorsed:] Answer to Petition.—Filed March 19, 1908.

132 PLAINTIFF'S EXHIBIT 6.

Final Decree of District Court.

At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court Rooms Thereof, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 23rd Day of June, 1908.

Present: Hon. George B. Adams, District Judge.

FREDERICK A. EGERTON and AUGUSTUS DEMAREST, Libellants, against
THE CANALBOAT "MACY," HER TACKLE, APPAREL, FURNITURE, etc.; Buchholz-Hill Transportation Company, Claimant; John F. Baxter, Respondent.

This cause having been heard on the pleadings and proofs of the respective parties hereto, and due deliberation having been had, and a decision having been rendered, and an interlocutory decree having been made and entered on the 6th day of June, 1908, whereby it was
adjudged that the libellants, Frederick A. Egerton and Au-
133 gust Demarest, should recover against the canalboat Macy, her tackle, apparel and furniture and her stipulators, the damages sustained by the libellants by reason of the injuries set forth in the libel, together with the costs to be taxed; and it having been further adjudged that the said petition of the Buchholz-Hill Transportation Company, filed under the 59th Rule of Admiralty to have John F. Baxter brought into this suit and proceeded against as if originally in the libel, should be dismissed, but not upon the merits, it being considered that the question of the liability of said John F. Baxter must be determined in a separate action; and said dismissal to be without prejudice to any such action; and it having been referred to Hon. Herbert Greene, United States Commissioner, to ascertain and report the libellant's damages; and the proctors for the libellants and for the canalboat Macy having stipulated the amount of said damages; and said stipulation having been submitted to the proctors for said John F. Baxter, and said proctor having waived notice of hearing before said commissioner; and the commissioner having made and filed his report and by said report having found that there was due to the libellants from the claimants of said canalboat Macy the sum of Forty-four hundred and sixty-four and 55/100 dollars ($4,464.55) and interest from March 1, 1907, amounting to the sum of Three hundred fifty-nine and 81/100 dollars ($359.81), and the costs having been taxed at the sum of One hundred and twenty and 81/100 dollars ($120.81), the costs of John F. Baxter having been taxed at the sum of Sixty-one and 21/100 dollars ($61.21). it is hereby
Ordered, adjudged and decreed, that the claimant, John F.
134 Baxter, do recover herein against the Buchholz-Hill Transportation Company and their stipulators for costs, the sum of

Sixty-one and 21/100 dollars ($61.21), the amount of his costs herein; and it is further

Ordered, adjudged and decreed, that the libellants, Frederick A. Egerton and August Demarest, do recover herein against the canal-boat Macy her tackle, apparel and furniture and against her stipulators, the sum of Forty-four hundred and sixty-four and 55/100 dollars ($4,464.55), with interest thereon, amounting to Three hundred and fifty-nine and 81/100 dollars ($359.81), together with the costs amounting to One hundred and twenty and 81/100 dollars ($120.81), making in all the sum of Four thousand nine hundred and forty-five and 17/100 dollars ($4,945.17), and it is further

Ordered, adjudged and decreed, that unless an appeal be taken from this decree within the time allowed by the rules and practices of this court and the stipulators for costs and value on the part of the respondent herein cause the engagement of their said stipulations to be performed or show cause within four (4) days after the expiration of said time why execution should not issue against their goods, chattels and lands to satisfy this decree.

GEORGE B. ADAMS, *D. J.*

T. A.

[Endorsed:] Final Decree—Filed June 23, 1908.

135 PLAINTIFF'S EXHIBIT 7.

U. S. Department of Agriculture, Weather Bureau.

Station: New York, N. Y.

Data Prevailing Direction of Wind 12 Noon to 12 Midnight Feb'y 12-19, 1907.

	12th.	13th.	14th.	15th.	16th.	17th.	18th.	19th.
10 P. M.—11 P. M.	NW	SW	SW	NW	SW	NW	NW	SE
11—12 Noon.	W	SW	SW	NW	SW	NW	NW	SE
12 Noon— 1 P. M.	NW	SW	SW	NW	SW	NW	NW	SE
1 P. M.— 2 P. M.	W	SW	SW	NW	SW	NW	NW	SE
2 P. M.— 3 P. M.	W	S	SW	NW	SW	NW	NW	SE
3 P. M.— 4 P. M.	W	S	SW	NW	S	NW	NW	S
4 P. M.— 5 P. M.	NW	S	W	W	S	NW	NW	SW
5 P. M.— 6 P. M.	NW	S	W	SW	S	NW	N	W
6 P. M.— 7 P. M.	NW	S	W	SW	S	NW	N	W
7 P. M.— 8 P. M.	NW	S	W	SW	SW	NW	NW	SW
8 P. M.— 9 P. M.	NW	S	W	SW	SW	NW	N	SW
9 P. M.—10 P. M.	NW	S	W	SW	SW	NW	NE	W
10 P. M.—11 P. M.	NW	S	W	SW	W	NW	SW	W
11 P. M.—12 Mid.	W	S	W	SW	SW	NW	W	W

EBEN H. EMERY, being duly sworn and examined as a witness for libellants, testifies:

By Mr. MARTIN:

Q. What is your occupation?

A. I am in charge of the Local Office of the U. S. Weather Bureau of New York.

Q. Have you produced at my request the records from that office of February, 1907?

A. I have.

Q. Look at those records commencing with the 12th day of February, 1907, at 7 o'clock A M., and state to me, please, the direction of the wind during the day, from 7 o'clock on?

A. February 12, 1907, from 7 A. M., to 9 A. M., the prevailing direction was west and northwest until 11 A. M. Then west from 11 to 12 noon; northwest from 12 noon to 1 P. M. and 1 P. M. till 4 P. M. Northwest the remainder of the day until 11 P. M. Between 11 P. M. and 12 midnight, the direction of the wind was west.

136 Q. Now take the 13th.

A. On the 13th the wind direction was west up to 10 A M., then southwest until 2 P. M. and south the remainder of the day to midnight.

Q. On the 14th.

A. On the 14th it was south until 3 A. M., then southwest to 4 A. M., south to 5 A. M., southwest from 5 to 6 A. M. South from 6 to 8 A. M. Southwest from 8 to 9 A. M. West from 9 to 10 A. M. Southwest till 4 P. M. and west the remainder of the time.

Q. On the 15th.

A. On the 15th it was generally Northwest until 4 P. M., occasionally west. West from 4 to 5 P. M., southwest to midnight.

Q. On the 16th.

A. On the 16th it was southwest until 3 P. M., then south until 7 P. M., then southwest until 10 P. M. West from 10 to 11 P. M. Southwest from 11 to 12 midnight.

Q. On the 17th.

A. On the 17th was generally southwest until 6 A. M. Then west until 9 A. M. Northwest the remainder of the time.

Q. Continue it on to the 20th if you please.

A. On the 18th the wind was generally northwest until 5 P. M. Then north from 5 to 7 P. M. Northwest from 7 to 8 P. M. North from 8 to 9 P. M. Northeast from 9 to 10 P. M. Southwest from 10 to 11 P. M. West from 11 to 12 P. M.

On the 19th the winds were west until 2 A. M., then easterly until 7 A. M., then southwest until 3 P. M., then it was rather variable. From 3 to 4 P. M., south; from 4 to 5 P. M., southwest; from 5 to 6 P. M., west; from 6 to 7 P. M., west; from 7 to 8 P. M., southwest; from 8 to 9 P. M., southwest, and west to midnight.

On the 20th the wind was west until 1 A. M.

Mr. BROWN: We object to this. This accident happened on the 14th, and any neglect would be found preceding the sinking
137 of the Hiawatha; therefore I don't think the weather conditions of the 20th of February are important here.

Mr. MARTIN: They allege they went to the scene of the disaster as soon as they could, and that was the 20th.

A. (continued). On the 20th it was West to 1 A. M., Northwest to 4 A. M., North to 8 A. M., Northeast to 1 P. M., North from 1 to 2 P. M., North from 2 to 3 P. M., Northeast until 9 P. M., Northwest 9 to 10 P. M., North 10 to 11 P. M., Northwest 11 to midnight.

Q. Kindly turn back to the 12th and please state what were the atmospheric conditions during the day?
A. On the 12th the weather was clear.
Q. All day?
A. All day.
Q. On the 13th?
A. On the 13th the general character of the day was partly cloudy.
Q. On the 14th?
A. On the 14th the general character was partly cloudy.
Q. Does the record show what parts of the day were clear and what parts cloudy?
A. Yes. On the 13th it was clear from 6 A. M. to 10.30 A. M. Partly cloudy from 10.30 A. M. to 11; then cloudy until 3 P. M. Partly cloudy from 3 P. M. to 3.45; then clear the remainder of the time until midnight.
Q. On the 14th?
A. On the 14th it was clear from 6 A. M. to 10.30; partly cloudy from 6 to 11.30. Clear from 11.30 to 1.15; partly cloudy from 1.15 to 1.45, and cloudy from 1.45 to 4 P. M. Partly cloudy to 4.30, and cloudy the remainder of the time.
Q. The 15th?
A. The 15th clear all day.
Q. The 16th?
A. The 16th cloudy.
Q. The 17th?
A. The 17th is changed pretty often from clear to partly cloudy.
Q. On the 18th?
A. Clear day.
138 Q. The 19th?
A. The 19th it was cloudy, generally cloudy up to 7.15 P. M., then clear and partly cloudy afterwards, and there was a little rain on this date.
Q. The 20th?
A. The 20th was a cloudy day.
Q. Does your record contain also the records of ice conditions?
A. Yes.
Q. Please tell us the ice conditions as observed by you in the North River on February 12th, 1907?

—. ——.

By Mr. BROWN:

Q. In what part of the river?
A. At the lower end of the Hudson where it empties into the Upper Bay.

Mr. BROWN: We object as to what the conditions of ice was in the Bay there, or even in the Hudson here, because it is quite different. At Corlears Hook it may be bad and at Newtown Creek may not be, and similarly in the Hudson River. The testimony should be as regards the ice near the scene of the disaster.

Q. Does your record cover Fort Lee?

A. Not as far as the observations, the actual observations, no, sir.
Q. You don't make observations up there at all?
A. Oh no.
Mr. BROWN: There is a bend in the river there; that makes it quite different.
The COURT: I allow the evidence to go in.
Q. (Repeated.) Please tell us the ice conditions as observed by you in the North River on February 12th, 1907.
A. On February 12th floating ice observed in the North River. On the 13th large quantities of floating ice observed in North and East River- and Upper Bay. On the 14th small quantities
139 of floating ice in North and East River- and Upper Bay. On the 15th small quantities of floating ice in North and East River-. On the 18th small quantities of floating ice in the North and East River-.
Q. What are the 16th and 17th?
A. Nothing else.

By Mr. BROWN:

Q. You have no records of observations for the 16th, 17th and 19th?
A. There was no floating ice on those days.
Q. Does your record show the temperature?
A. There might have been some up in the slips, I don't know anything about that, in the river. I don't think the observations would cover the slips; I mean the ferry slips.
Q. Have you any records showing what the temperature was?
A. On these days? Yes.
Q. Give that please.

Mr. BURLINGHAM: Let him start five or six days before the 12th, to show the conditions. Let him start with the 5th..

A. Commencing with the 5th of February, the temperature ranged between 20 and 14 degrees—20 degrees the highest and 14 the lowest.
February 6th, the highest temperature on that day was 19 and lowest 11.
On the 7th highest temperature 23 and lowest 11.
On the 8th highest 30 lowest 18.
On the 9th highest 31 lowest —.
On the 10th highest 43 lowest 28.
On the 11th highest 35 lowest 6.
On the 12th highest 16 lowest 1.
On the 13th highest 31 lowest 9.
140 On the 14th highest 44 lowest 28.
On the 15th highest 35 lowest 22.
On the 16th highest 41 lowest 25.
On the 17th highest 39 lowest 15.
On the 18th highest 32 lowest 13.
On the 19th highest 42 lowest 23.
On the 20th highest 38 lowest 32.

Cross-examined by Counsel for the Macy.

By Mr. BROWN:

Q. Where do you make the observations from as to ice conditions—from your office?
A. Yes, sir, 100 Broadway.

By the COURT:

Q. Do you use glasses or anything of that kind?
A. No, sir, we do not; eye observations.

By Mr. BROWN:

Q. You look out in the North River and East River and note the condition of the floating ice?
A. Yes, sir.

By the COURT:

Q. You don't use any magnifying glasses for your eyes?
A. No, sir.

By Mr. BROWN:

Q. Have you the velocity of the wind on the 12th of February, the average velocity? Start with the 7th of February, please.
A. The hourly velocities are here, and the maximum velocity, when they occur, above 25 miles. Do you want for each hour?
Q. No.
A. On February 7th the average velocity was 6.4 miles.
Q. On the 8th?
141 A. On the 8th the maximum velocity was 13. On the 8th the average velocity 6.6 miles. Maximum 14.
Q. What is the minimum, if you have got it?
A The lowest hourly movement was three miles.
Q. Give us the minimum and maximum and average up to the 15th.
A. On the 9th the lowest was 4 miles; maximum 13 miles, average 7.4 miles.
On the 10th the lowest 7 miles, maximum 40, average hourly velocity 13.1.
On the 11th the lowest hourly velocity was 13 miles, maximum 44 miles, average 24.3 miles.
On the 12th the least hourly velocity was 14 miles, maximum velocity 36 miles, average hourly velocity 22.7 miles.
On the 13th the least hourly velocity was 6 miles, maximum velocity 20 miles, average hourly velocity 11.3.
On the 14th the least hourly velocity 3 miles, maximum velocity 34 miles, average hourly velocity 11 miles.
The 15th, the least hourly velocity was 9 miles, maximum velocity 35 miles, average hourly velocity 17.7
Q. On the 14th will you give me the velocity of the wind at 11 o'clock, 12 o'clock, 1, 2 and 3?
A. From 10 to 11 nine miles. From 11 to 12 noon ten miles.

From 12 noon to 1 P. M. eleven miles. From 1 to 2 P. M. twelve miles. From 2 to 3 P. M. 12 miles. From 3 to 4 P. M. Fifteen miles. From 4 to 5 fifteen miles.

Q. At what hour was it 34 on the 14th?

A. That was between 11 P. M. and 12 midnight.

Q. Will you give us the direction of the wind on the 7th, 8th, 9th, 10th and 11th, not hour by hour?

A. It was generally northwest until 11 A. M. Then it was northeast from 11 to 12. Northwest from 12 to 1 P. M. West
142 from 1 to 2 P. M. South until 4. Generally southwest to west the remainder of the time.

Cross-examined by counsel for Mr. Baxter:

By Mr. BURLINGHAM:

Q. Give us the lowest velocity of the wind?

A. On the 7th the lowest was 4 miles.

Q. On the 8th?

A. On the 8th, generally the direction was west up to 9 A. M. Southwest to 12 noon. West to 3 P. M. Northwest 3 to 4 P. M. North the remainder of the time.

On the 9th north up to 9 A. M. Northeast till 12 noon. West till 3 P. M. Northwest from 3 to 4 P. M. South the remainder of the day.

On the 10th also the direction of the wind was south until 11 A. M. Southwest until 1 P. M. South until 5. Westerly the remainder of the time.

Q. These temperatures that you have given are just the kind of temperatures that make ice around there and make it float? That is, it is cold one day and lets up, and then you observe floating ice in the river. Are these the conditions that make ice, that lead to floating ice?

Mr. MARTIN: I suppose the Court is as competent to determine that as the witness.

The COURT: You want this from the witness individually, not from his records?

Mr. BURLINGHAM: I do. I will put my question differently.

Q. You have been a weather observer here for 15 years, haven't you?

A. Ten years—twelve years.

Q. You have noted when there was floating ice in the North and East Rivers during all that time?

A. Yes, sir.

143 Q. Have you sometimes noted that ice is not floating, that is, when it is fixed?

A. Well, I never knew it to be fixed since I have been in New York.

Q. That is to make a bridge to walk across; is that what you mean by fixed?

A. Yes.

Q. There was a good deal of ice in February, last year, wasn't there, in this harbor?

A. There was at certain times.

Q. About this time, large quantities of floating ice; you say on the 13th—the entry was that I think. When was there a good deal of ice, in what time of the year last year, before this, or after this, or at this time?

A. (Referring to the records.) There were large quantities on the 7th of February.

Q. What was there afterwards?

A. On the 8th, note was made, floating ice observed in the rivers and upper Bay.

Q. On the 9th?

A. On the 9th floating ice observed in the rivers and Upper Bay.

Q. 10th?

A. Small quantities of floating ice in the North River. 11th, small quantities of floating ice in the North and East River.

Q. Do you feel yourself competent to express an opinion as to the kind of weather that produces floating ice in the North River?

A. Yes, I know.

Q. What are the conditions that produce it?

A. Cold weather up the State and high winds following driving it down.

Redirect by counsel for libellants.

By Mr. MARTIN:

Q. What was the prevailing wind from the 12th along to the 15th?

A. As to what?

Q. What was the prevailing wind?

144 A. The prevailing wind from the 12th to the 15th? We would say it was off shore most of the time.

Q. Take the 12th; what was the prevailing wind?

By the COURT:

Q. Off what shore?

A. Off the Atlantic coast blowing towards the water.

On the 12th the direction of the wind was generally westerly up to 4 P. M., then northwest the remainder of the time.

On the 13th, westerly up to 10 A. M., southwest until 2 P. M. South the remainder of the time.

By Mr. MARTIN:

Q. On the 14th?

A. On the 14th south to southwest until 8 A. M., then generally southwest until 4 P. M., and west the remainder of the time.

By Mr. BROWN:

Q. The extent of ice in the rivers here then is not dependent upon, nor does it follow, the local conditions?

A. No.

Q. As to weather and wind?

A. No. As to wind where it is drifting it.

Q. The amount of floating ice around this river depends upon conditions not local at all?

A. Not local at all.

Q. It may be very mild and delightful weather here and the East and North River be full of ice at the same time, or the North River?

A. The temperature might rise very rapidly here, it would have to rise very rapidly to have warm weather here and ice in the river.

Q. In other words the ice that is produced and comes down the North River is a result of conditions that exist up river and not here?

A. Yes, sir, not here.

145 PLAINTIFF'S EXHIBIT 8.

Stipulation with Respect to Damages.

By consent this exhibit is not printed, the substance being given on page 48 of this record.

PLAINTIFF'S EXHIBIT 9.

Letter Read in Evidence.

FEB. 21/07.

Capt. John A. Rodgers, U. S. *M.*, Light House Inspector, Tompkinsville, S. I.

SIR: We are the owners of the barge Macy which sunk in the Hudson River off Fort Lee Feb. 12th, we at once notified our insurance underwriters who in turn gave immediate notice to the Baxter Wrecking Co. to locate and raise the boat at the earliest possible time. We understand the Baxter Wrecking Co. proceeded at once endeavoring to locate the boat, but on account of the extremely heavy ice they were unable to do so until Feb. 19th since that time they have had their equipment at the boat working with divers, lighters and wrecking tug, but on account of the heavy fields of ice coming down the Hudson River at intervals they were forced to abandon their work, taking away all their equipment each time a flow of ice appeared. We further understand they have regularly put out a spar buoy but each time the ice comes down this buoy is carried away.

We respectfully ask your assistance in this matter, to have you buoy this boat with a wreck buoy. We are doing everything in our power to comply with the United States laws governing
146 wrecks but we cannot overcome these conditions as regarding fields of ice coming down the river which cause the wreckers to abandon their work.

Very respectfully,

BUCHHOLZ-HILL TRANS. CO.,

—— ——, *Pres't.*

DEFENDANT'S EXHIBIT X FOR IDENTIFICATION.

Testimony Before District Court.

By consent this exhibit is not printed on account of its bulk, and inasmuch as it is substantially the same as the testimony taken on this trial.

DEFENDANT'S EXHIBIT Y FOR IDENTIFICATION.

Opinion of District Judge.

ADAMS, *J.:*

This is a case which arises because of a collision between the tugboat Hiawatha and the canal boat Macy which was sunk while proceeding through the ice on the North River, about opposite Fort Washington, but rather on the New Jersey side. The sinking occurred on the 12th of February, 1907.

On the 14th of February the tug Hiawatha with a tow alongside came out of the Harlem River into the Hudson River and, as stated, went over on the Jersey side of the river to avoid the ice that had accumulated on the New York side of the river.

There has been a very strong controversy with respect to that ice. On one side it has been claimed that there was plenty of clear water on the Jersey side for two or three days while the other side states that the river was absolutely closed from shore to shore. As
147 between the two contentions I have to decide one way or the other, and I must say that I believe there was some clear water on the New Jersey side.

The weather observer was on the witness stand and his testimony, as I recall it, was to the effect that for several days prior to this accident and for several days after it the wind was west, sometime northwest, sometimes southwest, but it is admitted by all parties that when the ice is free a west wind drives it over on the New York shore. We can all see that that must inevitably happen. There is nothing to prevent the ice from going over to the New York shore under those conditions and everything to take it there if there is enough of it to only partially fill the river.

It was a cold winter and there was a great deal of ice in the river. The people who have testified here I assume are all honest and intended to tell the truth but their stories did not agree as to the amount of the ice and to its location in the river. The question is whose story is the more probable? I think the testimony of those who said there was some free water on the New Jersey side should be accepted as true, as I do not see otherwise how this tug and tow could have gotten along as far as they did. If the river were all closed up, as some of the witnesses said, they could not have done so. I do not believe it was all closed up.

The libellants make numerous allegations of fault and especially invoke the rule of law which has been recently passed by Congress and reported in Chap. 425, of the Laws of 1899. That law has been mentioned here and it provides:

"Whenever a vessel, raft, or other craft is wrecked and sunk in a
" navigable channel, accident-ly or otherwise, it shall be the duty of
" the owner of such sunken craft to immediately mark it
148 " with a buoy or beacon during the day and a lighted lantern
" at night, and to maintain such marks until the sunken
" craft is removed or abandoned, and the neglect or failure of the
" said owner so to do shall be unlawful; and it shall be the duty of
" the owner of such sunken craft to commence the immediate re-
" moval of the same, and prosecute such removal diligently, and
" failure to do so shall be considered as an abandonment of such
" craft, and subject the same to removal by the United States as
" hereinafter provided for."

There is a case that arose under that Act, McCaffrey v. The canal boat Annie M. Fahy, decided by Judge Holt. The decision does not recite all the particulars about the accident but they appear in the opinion of the Circuit Court of Appeals. That was an action in rem, and I think that determines this question—which had been mentioned in the argument here and which has been suggested in the pleadings—as to whether, or not, an action of the kind is properly brought in rem or in personam. According to that case—and I think it would be correct otherwise, apart from the statute—if a boat ran on a sunken wreck, the wreck would be liable. Therefore we will pass that feature of the case.

In McCaffrey v. The Fahy the boat sank at 8.30 in the morning and the other boat ran on her shortly after 6 o'clock. It was a very short time from the sinking until the collision took place. Judge Holt held that the tugs that towed the canal boat were not liable and he said, "The statute imposes that duty, not upon the tugs, but " upon the owner of the barge."

I have just read the statute and it is quite in conformity with that decision. That decision was affirmed on appeal and it is very
149 important to consider the opinion on appeal because it makes rather of a change in what we have supposed the law to be in such a case.

There has been a case cited here in the argument in which an action was brought against a vessel for a mishap in attempting to do some work on her and where the Morse people were sued and they brought in the Merritt & Chapman Company. After considering that case I concluded that the Merritt & Chapman Company were liable for improper handling of a piece of machinery they were employed to remove from the vessel. I do not know whether that decision has been affirmed or not. There the Merritt & Chapman Company were in very much the same position that Mr. Baxter is here, that is, they were agents of the Morse people to do this work referred to.

It is claimed here that Mr. Baxter is not properly a party to this action and under the authority of the Fahy case I feel that is so. Apart from that case, according to the method that has been pursued in the admiralty actions, that of having the whole matter determined in one controversy, I should have considered that he was properly brought into the case.

In the Fahy case when other vessels were brought in by petition

as Mr. Baxter was here, the owner of the sunken boat which caused the disaster was held solely liable under the statute and the Circuit Court of Appeals affirming Judge Holt's decision *and* said, "The negligence in failing to act until after 6 o'clock was that of the wrecking company and its fault in this regard must be imputed to the claimant. The law imposes the duty of marking the wreck upon him and he cannot escape the responsibility by delegating it to others."

150 I think that language and that decision require that Mr. Baxter shall be exonerated simply because he was a mere agent. In determining that I do not say anything about the merits of the contention existing between the Baxter Company and the owner, I shall dismiss the petition under the authority of the Fahy decision. I suppose that this case will be taken up and that this point will be worked out and we shall find out what the law is. Had it not been for that case I should have thought that the Baxter people were properly here. I do not say they were in fault. It is not necessary for me to determine that. They being out of the case the question is should the respondents be held solely liable for this accident?

I do not think there can be any question about that under the statute. The statute says it shall be the duty of the owner to immediately mark the wreck. It has been urged here that they could not mark the wreck because they could not find it. How did they determine that they could not find it? Did they try to find it? Did they try to mark it? No. They did not try. They simply looked out and saw some ice and said, "We cannot do it." That is what Mr. Baxter said, and he was agent for the owners and they acted upon his judgment in the matter and did not attempt to mark the wreck. I rather believe that it could have been marked. The evidence shows here very clearly that buoys were put out by the government, and they could certainly have applied to the government in the beginning just as well as when they did and asked its officers to mark the wreck. The testimony here shows that the buoys disappeared under the ice but re-appeared just as soon as the ice had gone without being materially injured by it.

151 I believe therefore that the claimants should be held in this case because they failed to attempt in any way to comply with the statute. Whether, if they had attempted such compliance, it would have amounted to anything I do not know positively, but I believe they could have buoyed the wreck. At any rate, I am satisfied enough for the purposes here to determine that if they had put a buoy there it would have remained and served its purpose to show where the wreck was, when that buoy was not actually borne down by the ice.

I do not know whether I have met all the points that have been made in the argument. I will look them over briefly and see if there is anything more that is necessary to be said.

It has been urged very strongly that the owners of boats of this kind cannot be reasonably expected to carry a wrecking apparatus about. I think that is so. And it has been suggested that yachts, for example, could not carry it. I do not believe they could. But

if it had been a yacht involved here that yacht should have done something which would have brought about relief at the earliest possible moment. What could a yacht or any other boat have done under such circumstances? If they could not buoy that wreck themselves they could have gone to somebody who was in the buoying business and engaged them to put buoys on the wreck. Mr. Baxter I do not think was in any such business as that. I do not think he undertook to buoy the wreck, except as incidental to his own wrecking business. That he would have done at any rate in carrying out his own work. It is not at all probable that he would have undertaken that buoying as a separate job, that is, to put up the buoy. If I were required to decide as between him and the respondents, in order to hold Mr. Baxter, it would be necessary,
152 I think, to show that he undertook to place this buoy as a separate piece of work from that of raising the boat as a wrecking job. I do not see that there is any support for any such decision.

The whole conclusion is that the petition to bring in Baxter should be dismissed and there be a decree for the libellant against the claimants of the Macy with an order of reference.

DEFENDANT'S EXHIBIT A.

Claimant's Notice of Appeal.

United States District Court, Southern District of New York.

FREDERICK A. EGERTON and AUGUSTUS DEMAREST, Libellants,
against
THE CANALBOAT "MACY," HER TACKLE, APPAREL, &c.; BUCHholz-Hill Transportation Company, Claimant, and John F. Baxter, Respondent.

Please take notice that the Buchholz-Hill Transportation Company, the above claimant, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the decree entered herein on the 23rd day of June, 1908, in favor of the libel-
153 lant and against the claimant and in favor of the respondent, John F. Baxter.

Dated, June 26th, 1908.

Yours, &c.,

ARMSTRONG, BROWN & BOLAND,
Proctors for Appellant.

Office & Post Office Address, 71 Nassau Street, Borough of Manhattan, New York City.

To the Clerk of the United States District Court for the Southern District of New York; Messrs. Foley & Martin, Proctors for Libellant, 71 Wall Street, New York City; Messrs. Wing, Putnam & Burlingham, Proctors for Respondent, 27 William Street, New York City.

[Endorsed:] Notice of Appeal.—Filed July 3/08.

154 DEFENDANT'S EXHIBIT B.

Claimant's Assignment of Error.

United States District Court, Southern District of New York.

FREDERICK A. EGERTON and AUGUSTUS DEMAREST, Libellants,
against
THE CANALBOAT "MACY," HER TACKLE, APPAREL, &c.; BUCHHOLZ-Hill Transportation Company, Claimant, and John F. Baxter, Respondent.

The Buchholz-Hill Transportation Company, claimant and owner of the Canalboat Macy, hereby assigns errors in the proceedings and decree of the United States District Court for the Southern District of New York, entered herein June 23rd, 1908, as follows:

1st. In that said Court found the said claimant guilty of negligence in failing to buoy the wreck of the barge Macy.

2d. In that the Court determined that the said John F. Baxter could not be proceeded against in this suit.

3rd. In that the Court found that the said John F. Baxter should not be held solely responsible for the libellant's damages.

155 4th. In that the said Court directed the entry of the decree against the said canalboat Macy.

5th. In that said Court failed to find the claimant was entitled to limit its loss — the value of the wreck Macy and freight pending.

Dated, June 26, 1908.

ARMSTRONG, BROWN & BOLAND,
Proctors for Claimant, 71 Nassau St., New York City.

[Endorsed:] Assignment of Errors.—Filed July 3/08.

156 DEFENDANT'S EXHIBIT Z FOR IDENTIFICATION.

Opinion of the Circuit Court of Appeals.

United States Circuit Court of Appeals, Second Circuit.

FREDERICK A. EGERTON et al., Libellants-Appellees,
vs.
THE CANAL BOAT MACY, THE BUCHHOLZ-HILL TRANSPORTATION Co., Claimant-Appellant, and John F. Baxter, Respondent-Appellee.

Before Lacombe, Coxe, and Noyes, Circuit Judges.

Opinion.

William J. Martin, for Libellants.
Pierre M. Brown, for the "Macy."
Charles C. Burlingham, for the "Baxter."

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, in favor of the owners of the tugboat "Hiawatha" against the canal boat "Macy" for damages resulting from a collision.

LACOMBE, *C. J.*:

157 On February 14th, 1907, about 3 P. M., the tug Hiawatha was proceeding down the North River about 1,000 feet out from the Jersey shore in the vicinity of Fort Lee when she came into collision with the sunken canalboat "Macy." The latter, through some mishap into which it is not necessary to enquire, sank at about the place where the "Hiawatha" collided with her on February 12th between 7:30 and 8 A. M. No part of her projecting above the surface gave notice of her presence nor was her wreck marked by any buoy or beacon. Section 15 of the Act of March 25, 1899 (30 U. S. Stat. L., 1152), *which* provides as follows:

"Whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day, and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful."

This statute was before us in the Anna M. Fahy, 153 F. R., 866, where it was held that the duty of marking the location of the wreck was placed by the statute upon the owner and no one else, and that there is no divided responsibility. It was further held that when the owner of a sunken wreck has neglected to comply with the statute and, by reason of the absence of buoy, beacon or mark of any kind, a vessel herself free from fault has sustained damages by a collision

with the wreck, recovery therefore may be had against the offending vessel. We also held that the word "Immediately" as used
158 by the statute means within a reasonable time, having in view the circumstances of the particular situation in hand.

It is apparent therefore, that the decree against the "Macy" should be affirmed unless some special circumstance require such a construction of the word "Immediately" as would excuse her owner for his failure to mark her location for more than two days after she sank. It is contended that the river during this period was so obstructed with ice that the wreck could not be located. The testimony does not support any such contention. Probably the conditions were such that nothing could be done in the way of raising the wreck or even in beginning that operation but the mere locating of the wreck is a different matter. The master of the tug Terry which had the Macy in tow when she sank took his bearings at the time and when asked afterwards stated that she lay about 1,000 feet off the powder dock at Fort Lee. She was eventually found between 900 and 1,000 feet off that dock and, as the witness who found her says, "just where they told me she was from the office." Moreover when the searchers reached there they found that, by some chance, one of her fenders was floating above her its line being still fast to the wreck. There is nothing to indicate that if the owner had bestirred itself to get into communication with those on the tug who knew where she sank and to employ someone to do what the statute required it could not have complied with those requirements long before the Hiawatha struck the wreck.

The owner of the Macy also contends that it contracted with John F. Baxter (the Baxter Wrecking Co.) to do this, and has brought the latter in under the 59th Rule. As to what contract was
159 made between them we have the evidence only of the two individuals who entered into it, Baxter and Hill, the President of the claimant; the latter says it was to "locate buoy and raise the wreck," the former that it was "to recover the boat," the conversation was through telephone. We are persuaded that Baxter's recollection as to the conversation is the correct one; it certainly is inherently more probable. No doubt, in order to recover the boat it would be necessary to locate her and after she was located the usual course would be to mark her position for the guidance of the wrecking crews who might be sent to her. But that enterprise did not call for immediate action; we are not satisfied from the proof that it was agreed between the parties that aside from recovery of the boat Baxter agreed to carry out the special obligation, which the statute imposed upon the owner, of marking the position of the wreck by a buoy or beacon during the day and a lighted lantern at night and maintaining such marks until the sunken craft might be removed.

The decree of this District Court is affirmed with interest, and with costs to Baxter against the Macy.

May 25th, 1909.

160 DEFENDANT'S EXHIBIT C.

Order of the Circuit Court of Appeals.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 16th Day of June, 1909.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Walter C. Noyes, Circuit Judges.

FREDERICK A. EGERTON and Another, Libellants-Appellees,
against
THE CANALBOAT "MACY," HER TACKLE, etc.; THE BUCHHOLZ-HILL Transportation Company, Claimant-Appellant, and John F. Baxter, Respondent-Appellee.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

161 On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs and interest, and with costs to respondent, John F. Baxter, against the appellant, but without prejudice to the bringing of a new action by appellant against the said John F. Baxter for the relief prayed for in its petition against said Baxter.

It is further ordered, that a mandate issue to the said District Court in accordance with this decree.

DEFENDANT'S EXHIBIT D.

Form of Mandate.

By consent this exhibit is not printed, being in accordance with the order of the Circuit Court of Appeals.

162 DEFENDANT'S EXHIBIT E.

Final Decree of the District Court on Mandate.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Court Rooms, Borough of Manhattan, City of New York, on the 10th Day of June, 1909.

Present: Hon. George B. Adams, Judge.

FREDERICK A. EGERTON and AUGUSTUS DEMAREST, Libellants,
vs.
THE CANALBOAT MACY, THE BUCHHOLZ-HILL TRANSPORTATION COMPANY, Claimant, and JOHN F. BAXTER, Respondent.

An appeal having been taken by the claimant of the canalboat Macy to the United States Circuit Court of Appeals for the Second Circuit, from the decree entered herein June 23d, 1908, and said decree having been affirmed with interest and with costs to the respondent Baxter against the said canalboat, which costs have been taxed at the sum of $66.60, without prejudice to the bringing of a new
163 action by Buchholz-Hill Transportation Company, claimant of said canalboat, against said Baxter for the relief prayed for in its petition against said Baxter, as appears by the mandate filed herewith,

Now, on motion of Foley & Martin, proctors for the libellants, it is

Ordered, adjudged and decreed, that the judgment of the United States Circuit Court of Appeals for the Second Circuit be made the judgment of this Court, and that the libellants above named recover herein the sum of $4,945.17, together with interest thereon from June 23d, 1908, amounting to $284.35, making in all the sum of $5,229.52; and it is further

Ordered, adjudged and decreed, that John F. Baxter recover herein against the Buchholz-Hill Transportation Company the sum of $66.60, costs of said Circuit Court of Appeals, and the further sum of $61.21, costs of this Court, making in all the sum of $127.81; and it is further

Ordered, adjudged and decreed, that unless this decree be satisfied, the stipulators for costs and value on the part of the Buchholz-Hill Transportation Company, cause engagements of their stipulations to be performed, or show cause why execution should not issue against their goods, chattels and credits to enforce satisfaction therefor.

GEO. B. ADAMS,

Notice of settlement waived.

WING, PUTNAM & BURLINGHAM,
Proctors for Baxter.

ARMSTRONG, BROWN & BOLAND,
Proctors for Buchholz-Hill Transportation Co.

FOLEY & MARTIN,
Proctors for Egerton & Demarest.

164 The foregoing case and the exhibits therein mentioned and set forth contain all the evidence introduced and testimony taken on the trial of this action.

Stipulation Settling and Filing Case.

It is hereby stipulated that the foregoing proposed case and exceptions be settled and filed as above proposed, and that an order to that effect may be made without notice.

Dated, May 24, 1910.

ARMSTRONG, BROWN & BOLAND,
Attorneys for Plaintiff.

WING, PUTNAM & BURLINGHAM,
Attorneys for Defendant.

Order Settling and Filing Case.

The foregoing case and exceptions is hereby settled as above set forth as the case and exceptions on appeal in this action, and the same is hereby ordered filed as such.

Dated, May 26, 1910.

SAM'L T. MADDOX, *J. S. C.*

165 *Stipulation Waiving Certification.*

Supreme Court, Nassau County

THE BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing printed papers are true copies of the original judgment roll, order denying motion to set aside verdict, notice of appeal, and case and exceptions on appeal, as settled and filed, and stipulation and order settling same in the above-entitled action, all of which are on file in the office of the Clerk of the County of Nassau, and that the same shall constitute and be filed as the record on appeal in said action, and certification thereof is hereby waived.

Dated, New York, May 27, 1910.

ARMSTRONG, BROWN & BOLAND,
Attorneys for Plaintiff-Respondent.

WING, PUTNAM & BURLINGHAM,
Attorneys for Defendant-Appellant.

166 *Affidavit of No Opinion.*

Supreme Court, Nassau County.

THE BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant,

STATE OF NEW YORK,
County of Kings, ss:

Sidney P. Henshaw, being duly sworn, says, that he is an attorney in the office of Wing, Putnam & Burlingham, attorneys for the defendant-appellant herein; that he is familiar with the proceedings herein had, and that no opinion was rendered by the Honorable Samuel T. Maddox herein.

SIDNEY P. HENSHAW.

Sworn to before me this 25th day of May, 1910.

CHAUNCEY I. CLARK,
Notary Public, Kings County.

Certificate filed in New York County.

167 *Order Directing that Record Be Filed in Appellate Division.*

Supreme Court, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant.

Pursuant to Section 1353 of the Code of Civil Procedure, it is,
Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court for the Second Judicial Department.
Dated, New York, —— —, 1910.

SAM'L T. MADDOX, *J. S. C.*

168 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court Held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 30th Day of December, 1910.

Present:

Hon. Michael H. Hirschberg, Presiding Justice.
John Woodward,
Almet F. Jenks,
Edward B. Thomas,
William J. Carr,
Justices.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Respondent,
vs.
JOHN F. BAXTER, Appellant.

Order of Affirmance on Appeal from Judgment.

The above named John F. Baxter, the defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Nassau on the 24th day of March, 1910, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been argued by Mr. Norman B. Beecher, of counsel for the appellant, and by Mr. Pierre M. Brown, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby unanimously
169 affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter,

ALMET F. JENKS,
Justice Appellate Division.

Opinion of Appellate Division.

Supreme Court, Appellate Division, Second Judicial Department.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Respondent,
against
JOHN F. BAXTER, Appellant.

Appeal by the Defendant from a Judgment of the Supreme Court Entered in the Office of the Clerk of the Court of Nassau on the 24th Day of March, 1910, in Favor of the Plaintiff, and from an Order Entered in said Clerk's Office on the 7th Day of April, 1910, Denying a Motion for a New Trial.

Hirschberg, P. J.; Woodward, Jenks, Thomas, and Carr, JJ.

Norman B. Beecher (Charles C. Burlingham and Sidney P. Henshaw with him on the brief), for the Appellant.
Pierre M. Brown, for the Respondent.

THOMAS, *J.*:

The plaintiff's barge "Macy" was sunk in the North
170 River on February 12th, 1907, and on February 14th, the tug "Hiawatha" collided with the wreck, whereupon, to recover damages for the injury, her owners libeled the "Macy" in the District Court for the Southern District of New York, for negligent failure to mark immediately the place where the "Macy" sank, in the manner prescribed by the federal statute (§15, Act of March 25, 1899, 30 U. S. Stat. L., 1152). The plaintiff here, respondent there, pursuant to the 59th Rule in Admiralty, brought in Baxter, the present defendant, alleging that by contract between them the latter agreed to perform the statutory duty of marking the place of the wreck, and to raise her. The District Court, after hearing the case on the merits, decreed that the "Macy" was liable for the injury to the "Hiawatha," but dismissed the petition bringing in Baxter, "not upon the merits, it being considered that the question of the liability of "Baxter must be determined in a separate action." Thereupon the present plaintiff appealed to the United States Circuit Court of Appeals, where the action was heard upon the merits on the same evidence, and that Court, as appears from the opinion, considered that on the merits Baxter did not undertake to perform the statutory duty of marking the wreck, thereby impliedly deciding that Baxter was before the Court under the 59th Rule. The opinion stated: "The decree of this District Court is affirmed with interest, and with costs to Baxter against the Macy." Had the mandate followed the opinion, a decree entered pursuant thereto without question would estop the plaintiff in the action at bar. Pending the issuance of the mandate on the decision, the Court, upon plaintiff's motion and hearing thereof, adjudged "that the decree of
171 said District Court be and it hereby is affirmed * * * but without prejudice to the bringing of a new action by ap-

pellant against the said John F. Baxter for the relief prayed for in its petition against said Baxter," and the mandate accorded with such order. Thereupon a decree obedient to the mandate was entered in the District Court. The hearing in the Appellate Court was a trial de novo; it in the first instance decided the issue on the merits and in favor of the present defendant; its judgment should have followed its opinion, provided it continued to express its decision: it was moved to a reconsideration, and without further opinion adjudged that the decree below should be affirmed, which was a decree dismissing, but not on the merits, the petition, and that the affirmance should not prejudice the plaintiff's right to bring a new action on the merits, or, in other words, that it should not operate as an estoppel.

It is not for this Court to affirm that the United States Circuit Court of Appeals did something that under the federal practice it had no right to do. It was within its power to reconsider its decision and determine that the petition should be dismissed, but not on the merits, and it was not constrained to express its changed view in an opinion or other writing, but it did indicate its consideration of the matter by adjudging that the decree should be dismissed, not on the merits, in unequivocal language, and so its decree and that of the District Court stands. It is not the duty of this Court to revise it, or to determine that some other or different decree should be entered, or that it does not mean what it states, or that its effect and scope should be what the opinion, if preserved as the decision of the Court, would ascribe to it. Assume that the United States
172 Circuit Court had in its opinion concluded that Baxter was properly brought in, and not liable, and had, in manifest excess of power, ordered a new trial in the District Court. This Court could not refashion its decree to fit its decision. What its decree is it is, whether founded on error in practice or in decision, and back to the Court that made it Baxter should have gone, if he would have its decree conformed to an alleged finding. The appellant was properly denied in his attempt to show aliunde that the federal decree was an estoppel, for the reason that all he wished to introduce in that behalf is not effective for that purpose. The fact of what was litigated is not in doubt, nor is it questionable that the United States Circuit Court of Appeals primarily decided the merits fully in Baxter's favor, but what it did afterwards shows that it either changed its conclusion and decision, or ordered a decree to be entered thereon that did not adjudge as it had found. If it changed its view, this Court cannot assail its judgment embodying its decision thereon. If it made the same decision but did not make a decree to fit it, this Court cannot make over its decree to carry out its decision. But whether or not it changed its decision can only be known from its decree, mandate, and the decree below, and they show that they dismissed the action not on the merits. The question whether Baxter agreed to buoy the wreck in fulfillment of the statute in connection with his contract to raise it, was a question of fact, and it is considered that the verdict is not against the weight of evidence in the sense that justified this Court in granting a new trial.

The objection that, what Hill said to Baxter through the telephone was not admissible, is untenable. The telephone has become a common means of communication between persons not face
173 to face. The appellant's proposition is that if A and B, concededly have a conversation over a telephone, A can testify only to what he heard, and B to only what he heard, and that neither can testify to what he said. Such rule would admit fragments of conversation, maybe meaningless, and probably uninstructive. The conversation, that is, what one said and the other replied, is the only intelligible and helpful evidence.

The judgment and order should be affirmed, with costs.

Judgment of Affirmance.

Supreme Court, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

The appeal taken by the defendant herein from the judgment of this Court, entered March 24th, 1910, in favor of the plaintiff and against the defendant in the sum of $5,767.60, and also from the order denying the defendant's motion for a new trial, having come on regularly to be heard before the Appellate Division of the Supreme Court, Second Department, and said Court having thereafter by its order entered December 30th, 1910, unanimously affirmed the said judgment and order with costs, and the plain-
174 tiff's costs having been duly taxed in the sum of $104.23, it is

Adjudged, that said judgment and order be and the same are hereby unanimously affirmed; and it is

Further adjudged, that the Buchholz-Hill Transportation Company recover from John F. Baxter the sum of $104.23 costs and have execution therefor.

Dated, January 12th, 1911.

Entered in Nassau County, Jan. 12, 1911.

THOS. S. CHESHIRE.

Notice of Appeals to Court of Appeals.

New York Supreme Court, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
against
JOHN F. BAXTER, Defendant.

SIRS: Please take notice that the defendant above-named, John F. Baxter, hereby appeals to the Court of Appeals from the final judgment of affirmance in this action entered in the Office of the

Clerk of the County of Nassau on the 12th day of January, 1911, upon an order of affirmance made by the Appellate Division
175 of the Supreme Court in the Second Judicial Department and entered in the Office of the Clerk of said court on the 30th day of December, 1910, which said judgment affirmed with $104.23 costs the judgment entered in the above-entitled action on the 24th day of March, 1910, in the Office of the Clerk of the County of Nassau in favor of plaintiff and against defendant, for the sum of Five thousand seven hundred sixty-seven and 60/100 dollars ($5,767.60), and also the order denying the defendant's motion for a new trial; and from each and every part of said judgment.

Dated, New York, March 1st, 1911.

Yours, etc.,
BURLINGHAM, MONTGOMERY & BEECHER,
Attorneys for Defendant.

Office and Post Office Address, 27 William Street, Manhattan, New York City.

To Thomas S. Cheshire, Esq., Clerk, Nassau County; Messrs. Armstrong, Brown & Boland, Attorneys for Plaintiff.

176 *Stipulation Waiving Certification.*

Court of Appeals, State of New York.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff,
vs.
JOHN F. BAXTER, Defendant.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing case on appeal contains true copies of the judgment roll, notice of appeal, case and exceptions as settled, order of affirmance of the Appellate Division, opinion of the Appellate Division, judgment of affirmance and notice of appeal to the Court of Appeals and the whole thereof, now on file in the Office of the Clerk of the County of Nassau, and that certification thereof, pursuant to Section 1353 of the Code of Civil Procedure, or otherwise, be and the same hereby is waived, and it is consented that this appeal may be heard on the foregoing papers.

Dated, New York, March 20th, 1911.

ARMSTRONG, BROWN & BOLAND,
Attorneys for Plaintiff-Respondent.
WING, PUTNAM & BURLINGHAM,
Attorneys for Defendant-Appellant.

COUNTY CLERK'S OFFICE,
State of New York, County of Nassau, ss:

I, Thos. S. Cheshire, Clerk of the County of Nassau and of the Courts of Record thereof, do hereby certify that I have compared the annexed with the original Remittitur filed in my office July 11,

1912, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 14th day of Nov., 1912.

[Official Seal, County of Nassau, State of New York.]

THOS. S. CHESHIRE, *Clerk.*

177 Due service of three copies of the within case on appeal is hereby admitted this 20th day of March, 1911.

ARMSTRONG, BROWN & BOLAND,
Attorneys for Plaintiff-Respondent.

178 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 29th Day of June, in the Year of Our Lord One Thousand Nine Hundred and Twelve, Before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge Presiding.
R. M. BARBER, *Clerk.*

Remittitur, July 1st, 1912.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Respondent,
vs.
JOHN F. BAXTER, Appellant.

Be it remembered, That on the 22nd day of March in the year of our Lord one thousand nine hundred and eleven, John F. Baxter the appellant in this action, came here into the Court of Appeals, by Burlingham, Montgomery and Beecher, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Buchholz-Hill Transportation Company the respondent in said action, afterwards appeared in said Court of Appeals by Armstrong, Brown and Boland, its Attorneys.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Norman B. Beecher of Counsel for the appellant, and by Mr. Pierre M. Brown of counsel for the respondent, and after due deliberation had thereon, did order and adjudge *the* the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed.

And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal of this Court.

179 And it was also further ordered, that the record aforesaid and the proceedings in this Court be remitted *and* the said Supreme Court, there to be proceeded upon according to law

Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and affect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS,
CLERK'S OFFICE, ALBANY, *July 1st*, 1912.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

180 At a Special Term of the Supreme Court, Held in and for the County of Kings, at the Kings County Court House, in the Borough of Brooklyn, New York City, on the 8th Day of July, 1912.

Present: Hon. Abel E. Blackmar, Justice.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant.

The remittitur of the Court of Appeals in the above entitled cause having been presented herewith,

On motion of Armstrong & Brown, attorneys for Plaintiff-Respondent, it is

Ordered, that the judgment of the Court of Appeals be, and the same is hereby made the judgment of this Court. And it is further

Ordered, that the plaintiff herein recover from the defendant herein, plaintiff's costs, as taxed, and that the Clerk enter judgment accordingly.

Enter Nassau County.

A. E. B.,
Justice Supreme Court.

Granted July 9th, 1912.
CHARLES S. DEVOY, *Clerk.*

Entered in Nassau County Jul- 11, 1912.
THOS S. CHESHIRE, *Clerk.*

COUNTY CLERK'S OFFICE,
State of New York,
County of Nassau, ss:

I, Thos. S. Cheshire, Clerk of the County of Nassau and of the Courts of Record thereof, do hereby certify that I have compared the annexed with [illegible]iginal Order filed in my office July 11, 1912 and that the same [illegible] a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 4th day of Dec. 1912.

[Official Seal County of Nassau, State of New York.]

THOS. S. CHESHIRE, *Clerk.*

O. K.
G. D. C.

181 [Endorsed:] July 11, 1912. Clerk's Index No. —, Year —. Supreme Court, Kings County. Buchholz-Hill Transportation Company, Plaintiff-Respondent, against John F. Baxter, Defendant-appellant. Copy. Order with Notice of Entry. Armstrong & Brown, Attorneys for p'ff-resp., Office and P. O. Address, No. 27 Cedar Street, Manhattan, New York City. A copy received Jul- 12, 1912. Burlingham, Montgomery & Beecher.

Notice of Entry.

SIR: Please to take notice that the within is a copy of an order this day duly entered and filed herein in the office of the clerk of the County of Nassau.

Dated, New York, July 11th, 1912,

Yours, etc., ARMSTRONG & BROWN,
Attorneys for P't'ff-Re'ps.

Office & Post Office Address, 27 Cedar Street, New York City.

To Burlingham, Montgomery & Beecher, attorneys for def't-app., 27 William Street, N. Y. City.

182 Supreme Court, Nassau County.

BUCHHOLZ-HILL TRANSPORTATION COMPANY, Plaintiff-Respondent,
against
JOHN F. BAXTER, Defendant-Appellant.

The defendant herein having appealed to the Court of Appeals from the judgment of affirmance entered in this action in the office of the Clerk of the County of Nassau, on the 12th day of January, 1912, and said Court of Appeals having affirmed said judgment, and the remittitur having been duly filed, and an order having been en-

tered by this Court, directing that the judgment of said Court of Appeals be entered accordingly, in favor of the plaintiff, with costs, and plaintiff's costs having been duly taxed in the sum of One hundred Six and 58/100 Dollars.

On motion of Armstrong & Brown, attorneys for the plaintiff, it is adjudged,

1st. That the judgment of the Court of Appeals be, and the same is hereby made the judgment of this Court.

2nd. That the said judgment of affirmance entered on January 12th, 1912, be in all things hereby affirmed.

And it is further adjudged:

3rd. That the Buchholz-Hill Transportation Company, plaintiff, do recover of John F. Baxter, defendant, the sum of One hundred six & 58/100 Dollars, costs as adjusted, and have execution therefor.

Dated, July 11, 1912.

Signed & Entered in Nassau County Jul- 11, 1912.

THOS. S. CHESHIRE, *Clerk.*

COUNTY CLERK'S OFFICE,
State of New York, County of Nassau, ss:

I, Thos. S. Cheshire, Clerk of the County of Nassau and of the Courts of Record thereof, do hereby certify that I have compared the annexed with the original Judgment filed in my office July 11, 1912, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 9th day of Nov. 1912.

[Official Seal County of Nassau, State of New York.]

THOS. S. CHESHIRE, *Clerk.*

O. K.
C. E. C.

183 [Endorsed:] Clerk's Index No. —. Year —. Supreme Court, Nassau County. Buchholz-Hill Transportation Company, Plaintiff-resp. against John F. Baxter, Defendant-app. (Copy.) Judgment with notice of Entry. Armstrong & Brown, Attorneys for p'ff-resp., Office and P. O. Address, No. 27 Cedar St., Manhattan, New York City. Due and timely service of a copy of the within — and notice hereon endorsed is hereby admitted. Dated, New York, —— —, 191–. To Burlingham, Montgomery & Beecher, Esq-., Attorneys for def't-app., Office and Post Office Address, No. 27 William Street, New York City.

[Stamp:] A copy received Jul- 12, 1912. Burlingham, Montgomery & Beecher.

Notice of Entry.

SIR: Please to take notice that the within is a copy of a Judgment this day duly entered and filed herein in the office of the Clerk of the County of Nassau.

Dated, New York, July 11th, 1912.

Yours, etc., ARMSTRONG & BROWN,
Attorneys for P'ff-Resp.

Office and Post Office Address, No. 27 Cedar Street, Manhattan, New York City.

To Burlingham, Montgomery & Beecher,, Esq-., Attorneys for Def't-app., Office and Post Office Address, No. 27 William Street, New York City.

184 Know all men by these presents:

That, we, John F. Baxter, as Principal and the Illinois Surety Company, a corporation organized and existing under and by virtue of the Laws of the State of Illinois, and lawfully transacting business within the State of New York, and having an office and principal place of business at #5 Nassau Street, in the Borough of Manhattan, City, County and State of New York, as Surety, are held and firmly bound unto the Bucholz Hill Transportation Company in the full and just sum of Five Hundred ($500) Dollars to be paid to the said Bucholz Hill Transportation Company, its successor or successors, to which payment well and truly to be made. said Principal binds himself, his heirs, executors and administrators, and the said Surety binds itself, its successor or successors, jointly and severally, firmly by its presents.

Sealed with our seal and dated the 4th day of November in the year of our Lord, One Thousand Nine Hundred and Twelve.

Whereas lately at a Supreme Court of the State of New York in a suit depending in said Court between John F. Baxter, Appellant, and Bucholz Hill Transportation Company, Appellee, a judgment was rendered against the said Appellant, and the said Appellant having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Bucholz Hill Transportation Company, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said John F. Baxter shall prosecute said Writ of Error to effect and answer all damages and costs, if he fail to make the plea good, then the above obligation to be void; else to be and remain in full force and virtue.

JOHN F. BAXTER, [SEAL.]
ILLINOIS SURETY COMPANY,
[SEAL.] By J. ELIHU ROOT KUNZMANN,
Attorney-in-Fact.

Approved as to form and amount, without prejudice to former supersedeas bonds given herein by above company.

ARMSTRONG & BROWN,
Att'ys for Buchholz Hill Transportation Co.

Approved Nov. 22, 1912.
CHARLES E. HUGHES.

185 CITY AND COUNTY OF NEW YORK;
State of New York, ss:

On the 4th day of November, 1912, before me personally came J. Elihu Root Kunzmann, to me known, who, being duly sworn, did depose and say that he resides in the City of New York; that he is an attorney-in-fact of the Illinois Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal attached to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided by law.

Sworn to before me the day and year first above written.

[SEAL.] HERMAN GEILER, *Notary Public,*
Commissioner of Deeds for the City of New York.
Residing in the Borough of Manhattan.

Power of Attorney from Illinois Surety Company to D. Clinton Mackey, Hulbert T. E. Beardsley, and J. Elihu Root Kunzmann, or Any of Them.

Know all men by these presents: That the Illinois Surety Company, a corporation duly incorporated under the laws of the State of Illinois, and duly authorized to act as sole surety, in pursuance of the following resolution, which was passed by the Board of Directors of the Company at a meeting held March 25, A. D. 1907, to-wit:

"Resolved that the President, Vice-President or an Acting-President is hereby authorized, empowered and directed to make and appoint such agents and to execute such Powers of Attorney to accept process for and on behalf of this Company, or to authorize the said attorneys and agents to execute Bonds, undertakings or writings obligatory in the nature thereof, for and on behalf of this Company, as shall be needful, and to the same extent and effect as though said appointments were severally made by separate action of the Board of Directors in each instance, and the Secretary or Assistant Secretary is hereby authorized, empowered and directed to authenticate such appointments, affixing the corporate seal of the Company to the same."

has made, constituted and appointed, and by these presents doth make, constitute and appoint D. Clinton Mackey, Hulbert T. E.

Beardsley and J. Elihu Root Kunzmann, of the City, County and State of New York, or any of them, its true and lawful attorneys-in-fact, with full power and authority to sign, seal, acknowledge and deliver in its name, place and stead, as surety, Bonds, undertakings or writings obligatory in the nature thereof, and when such Bonds, undertakings or writings obligatory are signed by the said D. Clinton Mackey, Hulbert T. E. Beardsley and J. Elihu Root Kunzmann, or any of them, as attorneys-in-fact, to bind the Company as fully and to the same extent as if said Bonds, undertakings or writings obligatory in the nature thereof, were executed by the Executive Officers of this Company at its Home Office in the City of Chicago, State of Illinois, and the Company hereby ratifies and confirms all that its said attorney-in-fact may do or lawfully cause to be done in the premises by virtue of these presents.

In witness whereof, the Illinois Surety Company has caused these presents to be signed by its President, attested by its Secretary and its corporate seal to be hereunto affixed this twenty-fourth day of January, A. D. 1912.

[SEAL.] ILLINOIS SURETY COMPANY,
By A. J. HOPKINS, *President.*

Attest:
CHAS. E. SCHICK,
Secretary.

I, J. Howard Cahill, Assistant Secretary of the Illinois Surety Company, hereby certify that the above Power of Attorney is a true copy of the original records of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this twenty-fourth day of January, A. D. 1912, at the City of Chicago, State of Illinois.

[SEAL.] J. HOWARD CAHILL,
Assistant Secretary.

Statement of Financial Condition of Illinois Surety Company at the Close of Business December 31, 1911.

Assets.

Bonds	$432,249.41
Cash in Office and Depositories	60,651.65
Premiums in Course of Collection	184,823.18
Accrued Interest	6,467.10
Bills Receivable	3,082.31
Advance on Contracts	23,672.25
Suspense	462.52
Miscellaneous Accounts Receivable	1,111.32
Due from Excise Committee	36,704.71
	$699,224.45

Liabilities.

Capital Stock	$250,000.00
Surplus	50,000.00
Undivided Profits	122,026.89
Collateral Deposits	7,814.96
Reserve for Losses and Contingencies	53,600.39
Reserve for Re-Insurance	175,447.64
Accrued Taxes	946.23
Due for Re-Insurance	9,120.92
Commissions Accrued not due	30,267.42
	$699,224.45

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, J. Elihu Root Kunzmann, Attorney-in-fact of the Illinois Surety Company, do hereby certify that the foregoing is a true and correct copy of the statement of assets and liabilities of the said Company at the close of business, December 31, 1911.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Company, this 4th day of November, 1912.

[SEAL.] J. ELIHU ROOT KUNZMANN,
Attorney-in-Fact.

Subscribed and Sworn to before me this 4th day of November, 1912.

HERMAN GEILER, *Notary Public,*
Commissioner of Deeds for the City of New York,
Residing in the Borough of Manhattan.

186 COUNTY CLERK'S OFFICE,
State of New York, County of Nassau, ss:

I, Thos. S. Cheshire, Clerk of the County of Nassau and of the Courts of Record thereof, do hereby certify that I have compared the annexed with the original Bond filed in my office Nov. 27, 1912, and that the same is a true transcript thereof, and of the whole of such original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court this 4th day of Dec., 1912.

[Official seal County of Nassau, State of New York.]

THOS. S. CHESHIRE.

187 [Endorsed:] Nov. 27, 1912. John F. Baxter and Illinois Surety Company to Bucholz Hill Transportation Company. Copy. Service of a copy of within bond admitted this 23 day of November, 1912. Armstrong & Brown, Att'ys for def't-in-error. Illinois Surety Company, Chicago, Ill.

188 STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of the opinion in the case of Buchholz-Hill Transportation Co. Resp'd't, v. John F. Baxter, App'l't, decided by the Court of Appeals on the 29th day of June 1912, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 2nd day of December 1912.

[Seal State of New York Court of Appeals.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals of the State of New York.

Attest:
[L. S.]

R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Buchholz-Hill Transportation Co. Resp'd't v. John F. Baxter, App'l't, decided by the said Court of Appeals on the 29th day of June 1912, is in due from and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 2nd day of December in the year of one thousand, nine hundred and twelve.

[Seal Court of Appeals, State of New York.]

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

189 BUCHHOLZ-HILL TRANSPORTATION COMPANY, Respondent,
v.
JOHN F. BAXTER, Appellant.

(Decided June 29, 1912.)

WILLARD BARTLETT, J.:

In this action the plaintiff has recovered damages against the defendant for his failure to fulfill the obligation of a contract whereby he undertook to mark with a buoy or other suitable beacon the place in the North river where a canal boat belonging to the plaintiff had sunk. In consequence of the failure to buoy the wreck, as required by the laws of the United States, the plaintiff was adjudged liable for the injuries sustained by a tug belonging to other parties which was sunk by collision with the submerged canal boat. This liability was enforced by a suit in admiralty to which the defendant in the present action was made a party upon an allegation that he had contracted to perform the statutory duty of marking the place of the wreck. The United States District Court awarded damages against the Buchholz-Hill Transportation Company for the sinking of the tug but dismissed the proceeding as against John F. Baxter on the ground that his liability should be determined in a separate action. An appeal was taken by the Buchholz-Hill Transportation Company to the United States Circuit Court of Appeals, where the decree of the District Court was affirmed.

The only question which has been discussed upon the argument of the present appeal is whether this judgment of affirmance in the United States Circuit Court of Appeals should have been received in evidence as proof of a former adjudication fatal to the plain-
190 tiff's claim. The judge who tried the case in the District Court, although he dismissed the petition to bring in Baxter as a party, nevertheless expressed the opinion that Baxter had not in fact undertaken to buoy the wrecked canal boat; and the opinion in the Circuit Court of Appeals, where under the Federal practice all the evidence was considered de novo, shows that the judges of that tribunal entertained the same view so far as Baxter's liability was concerned. It seems that such an opinion in a Federal court is deemed equivalent to a decision containing findings in a state court (Cahill v. Standard Marine Ins. Co., 204 N. Y. 190); and that if in the case under consideration it had been followed by a simple decree of affirmance the adjudication would have been conclusive against the claim prosecuted by the plaintiff in the present action. The United States Circuit Court of Appeals, however, before any mandate had been issued upon its decision entertained an application by the Buchholz-Hill Transportation Company as to the form of its decree and the decree was worded so as to order an affirmance of the decree of the District Court "but without prejudice to the bringing of a new action by appellant (the Buchholz-Hill Transportation Company) against the said John F. Baxter for the relief prayed for in its petition against said Baxter."

The Appellate Division has held, as we think rightly, that the effect of this language was to prevent the decree in the admiralty suit from being available to the defendant under his plea of former adjudication.

The phraseology thus limiting the effect of the decree is
191 analogous to that of a decree in equity which dismisses the bill without prejudice. "Where a bill in equity is dismissed without prejudice," says Mr. Black in his well-known treatise on the Law of Judgments, "the effect of the reservation is to prevent the decree from constituting a bar to another suit brought upon the same subject-matter;" and he points out that it makes no difference that the court erred in dismissing the bill without prejudice when it ought to have been dismissed finally upon the merits, for if the decree is void for want of authority to make the reservation there is no valid adjudication to stand in the way of a new suit, and if the reservation is merely irregular or erroneous it can only be corrected on appeal and until so corrected must stand as rendered. (2 Black on Judgments (2nd ed.), Section 721.) A decision without prejudice has been declared to be like a non-suit in a common-law action. (Northern Pacific R. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. Rep. 536.) In O'Keefe v. Irvington Co. (87 Md. 196) the Supreme Court of Maryland declares that it is clearly the purpose as well as the effect of using the words "without prejudice" in a decree to prevent the defendants from availing themselves of the defense of res adjudicata in any subsequent proceeding by the same plaintiffs on the same subject-matter; and many decisions to the same effect are cited in that case. In addition to them we may refer to Hazen v. Lyndonville Bank (70 Vt. 543), where it is said: "A decree in equity dismissing the bill, without prejudice, only puts an end to the suit then pending and is not a bar to a subsequent suit for the same cause of action." In Massachusetts it is held that a declaration in a decree for divorce dismissing the libel without prejudice
192 imports that it is not intended to be a bar to a new libel for the same cause. (Thurston v. Thurston, 99 Mass. 39.)

We think that the same implication is involved in the language used by the United States Circuit Court of Appeals in affirming the judgment in the admiralty suit without prejudice. It is argued in behalf of the appellant that this limitation in the decree of affirmance does not affect the finding of fact contained in the opinion to the effect that Baxter had not contracted to buoy the wreck. But is this the necessary or fair inference to be drawn from the action of the Circuit Court of Appeals? We think not. The insertion of the provision in the decree limiting its effect so far as Baxter was concerned is equally consistent with a conclusion on the part of the Circuit Court that the judges had not heard this branch of the case fully enough to be able to decide it justly and, therefore, preferred to leave it open for future adjudication. At all events they chose thus to restrict the operation of their judgment; it is plain that they did this intentionally and with careful consideration; and the courts of this state ought not to give to the decree of a Federal court an effect as a

former adjudication which would be denied to such decree by the Federal courts themselves.

For these reasons, in addition to those stated by Mr. Justice Thomas in the opinion of the Appellate Division, we think that the judgment should be affirmed, with costs.

Cullen, Ch. J., Haight, Vann, Werner and Chase, JJ., concur; Gray, J., absent.

Judgment affirmed.

[Endorsed:] Filed Dec. 4, 1912. #6300.

193 Supreme Court of the United States.

JOHN F. BAXTER, Plaintiff-in-Error,
vs.
BUCHHOLZ-HILL TRANSPORTATION COMPANY, Defendant-in-Error.

Application for Writ of Error.

To the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States:

The Petition of John F. Baxter respectfully shows:

That on June 30, 1909, the plaintiff commenced an action at law against the defendant for the recovery of the amount of damages the plaintiff had been compelled to pay the owners of the tug Hiawatha which had run upon the wreck of the plaintiff's barge Macy which had sunk in the North River and which had not been marked as required by the federal statutes. The plaintiff claimed that the defendant had agreed with it to perform this statutory duty for it.

As a defense to this action, the defendant pleaded as res judicata a decision of the Circuit Court of Appeals which was rendered under the following circumstances:

The owners of the Hiawatha libelled the Macy, in the District Court for the Southern District of New York and the owners of the Macy brought in the defendant Baxter by petition under the 59th Rule in Admiralty, alleging that Baxter had contracted to locate, buoy and raise the wreck of the Macy and to mark it as provided by statute. The District Court sustained the libel against the
194 Macy, but dismissed the petition to bring in Baxter on the ground that he could not be properly brought in under the 59th Rule.

On appeal to the Circuit Court of Appeals that court held that Baxter could properly be brought in under the 59th Rule and his liability be determined in that proceeding, but the opinion of the Circuit Court of Appeals was that Baxter had not agreed to perform the Transportation Company's statutory duty and it dismissed the petition as to Baxter with costs to him against the Macy. The mandate of the Circuit Court of Appeals and the decree of the District Court entered thereon purported to be without prejudice to the bringing of a new action by the Transportation Company against Baxter. To show that the Circuit Court of Appeals had considered

and decided the claim of the Transportation Company against Baxter upon the merits, the plaintiff in error offered in evidence the evidence before the Circuit Court of Appeals and the opinion of that Court. The Supreme Court refused to receive them in evidence and it refused to hold the proceedings in the Circuit Court of Appeals together with the proceedings in the District Court subsequent thereto, a bar to this action. An appeal was taken by the defendant to the Appellate Division of the Supreme Court and to the Court of Appeals of the State of New York, and in each court it was urged that the proceedings in the Circuit Court of Appeals were a bar to this action and in both courts no effect was given to said proceedings, as will appear by reference to the record and proceedings in said cause in said Court of Appeals, which Court is the highest court of said State of New York in which a decision and judgment in said suit could be had.

195 On July 11, 1912, a judgment of the Supreme Court of the State of New York was entered in the County of Nassau in said State upon the remittitur from the Court of Appeals, affirming with costs a judgment of the Supreme Court entered in said County against your petitioner and in favor of the plaintiff for the sum of Five thousand seven hundred sixty-seven and 60/100 ($5,767.60) dollars.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, the plaintiff-in-error prays for the allowance of a writ of error returnable in the Supreme Court of the United States, and a citation.

And so *it* will ever pray, etc.

Dated, November 19, 1912.

JOHN F. BAXTER,
By CHARLES C. BURLINGHAM, *Attorney.*

196 [Endorsed:] Nov. 27, 1912. Supreme Court of the U. S. John F. Baxter, Plaintiff-in-Error, vs. Buchholz-Hill Transportation Company, Defendant-in-Error. Application for Writ of Error. Charles C. Burlingham, Attorneys for Defendant, 27 William Street, Borough of Manhattan, New York City. Let the writ issue. Nov. 22d, 1912. Charles E. Hughes, Associate Justice of the Supreme Court of the United States.

197 UNITED STATES OF AMERICA:

Supreme Court of the United States.

JOHN F. BAXTER, Plaintiff-in-Error,
against
BUCHHOLZ HILL TRANSPORTATION COMPANY, Defendant-in-Error.

Assignment of Errors by Plaintiff in Error.

And now comes John F. Baxter, plaintiff in error in the above-entitled cause and in connection with his application for a writ of error makes his assignment of errors:

I. The Court erred in deciding that the proceedings in the Circuit Court of Appeals for the Second Circuit in the suit entitled "Frederick A. Egerton and another, libellants, against the canalboat Macy, her tackle, etc., Buchholz Hill Transportation Company, claimant, and John F. Baxter, respondent" did not constitute a bar to the prosecution of this action against the plaintiff in error and that said proceedings did not estop the defendant in error from prosecuting this action and that they did not render the matters in issue in said suit in the Circuit Court of Appeals res adjudicata in this action, and thereby denied to said proceedings in the Circuit Court of Appeals their full faith and credit in violation of Article 4, Section 1 of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto and
198 by said decision was drawn in question an authority exercised under the United States and the decision was against its validity, and by said decision was drawn in question an authority of the United States exercised under Article 3 sections 1 and 2 of the Constitution of the United States and the Acts of Congress enacted pursuant thereto and the decision was against its validity.

II. The Court erred in not deciding that the above mentioned proceedings in the Circuit Court of Appeals constituted a determination, conclusive in this action, that the plaintiff in error made no such contract as is claimed in the defendant in error's complaint, and thereby denied to said proceedings in the Circuit Court of Appeals their full faith and credit in violation of Article 4, Section 1, of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto, and therein was drawn in question an authority exercised under the United States, and the decision was against its validity, and by said decision was drawn in question an authority of the United States exercised under Article 3 Sections 1 and 2 of the Constitution of the United States and the Acts of Congress enacted pursuant thereto and the decision was against its validity.

III. The Court erred in not admitting into evidence the testimony before the Circuit Court of Appeals in the above mentioned appeal and the opinion of said Court, which were duly offered in evidence and which showed that the proceedings in said Court and the final decree entered thereupon constituted a decision upon the merits on the matters there in issue, and the Court for that reason
199 held that said proceedings in the Circuit Court of Appeals were not a bar to the prosecution of this action by the defendant in error and that the issues involved in this action were not res adjudicata, and the Court thereby denied to said proceedings in the Circuit Court of Appeals their full faith and credit in violation of Article 4, Section 1, of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto, and therein was drawn in question an authority exercised under the United States, and the decision was against its validity, and by said decision was drawn in question an authority of the United States exercised under Article 3 Sections 1 and 2 of the Constitution of the United States

and the Acts of Congress enacted pursuant thereto and the decision was against its validity.

IV. The Court erred in not rendering judgment in favor of the plaintiff in error for the reason that the said proceedings in the Circuit Court of Appeals and the final decree entered thereupon as set forth in plaintiff in error's answer, duly proved or offered to be proved upon the trial, conclusively adjudged and determined in favor of the plaintiff in error, that no cause of action existed in favor of the defendant in error against the plaintiff in error by reason of the matters set forth in its complaint and in refusing so to adjudge the Court thereby denied to said proceedings their full faith and credit in violation of Article 4, Section 1, of the Constitution of the United States, and of the Acts of Congress enacted pursuant thereto, and therein was drawn in question an authority exercised under the United States, and the decision was against its validity, and

200 by said decision was drawn in question an authority of the United States exercised under Article 3 Sections 1 and 2 of the Constitution of the United States and the Acts of Congress enacted pursuant thereto and the decision was against its validity.

Dated, New York, November 19, 1912.

CHARLES C. BURLINGHAM,
Attorney for John F. Baxter.

201 [Endorsed:] Nov. 27, 1912. Supreme Court of the U. S. John F. Baxter, Plaintiff-in-Error, vs. Buchholz-Hill Transportation Company, Defendant-in-Error. Assignment of Errors by Plaintiff in Error. Charles C. Burlingham, Attorneys for Pl- in error, 27 William Street, Borough of Manhattan, New York City. Service of within Assignments of error is hereby admitted, this 23 day of November 1912. Armstrong & Brown, Attorneys for def- in error.

202 Supreme Court of the United States.

JOHN F. BAXTER, Plaintiff-in-Error,
against
BUCHHOLZ-HILL TRANSPORTATION COMPANY, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above-named plaintiff in error and, in connection with his writ of error issued by this Court to the Supreme Court of the State of New York, Nassau County, he prays for a reversal of the judgment against him entered in the office of the Clerk of Nassau County, on March 24, 1910, in an action brought by the defendant in error against the plaintiff in error in said Court, and also prays for a reversal of the judgment of affirmance entered in the office of said Clerk on January 12, 1911 upon an order of affirmance of the Appellate Division of the Supreme Court, Second Judicial

Department, entered in the office of the clerk thereof on December 30, 1910, and for a reversal of the judgment of the Court of Appeals affirming said judgments of the Supreme Court.

CHARLES C. BURLINGHAM,
Attorney for John F. Baxter, Plaintiff-in-Error.

203 [Endorsed:] Nov. 27, 1912. Supreme Court of the U. S. John F. Baxter, Plaintiff-in-Error, vs. Buchholz-Hill Transportation Company, Defendant-in-Error. Prayer for Reversal. Charles C. Burlingham, Attorney for plaintiff in error, 27 William Street, Borough of Manhattan, New York City. Service of within Prayer for Reversal is hereby admitted, this 23 day of November 1912. Armstrong & Brown, Attorneys for def- in error.

204 UNITED STATES OF AMERICA, *ss:*

To Buchholz Hill Transportation Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, wherein John F. Baxter is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 22d day of November, in the year of our Lord one thousand nine hundred and twelve.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

205 [Endorsed:] Nov. 27, 1912. Supreme Court of the U. S. John F. Baxter, Plaintiff-in-Error, vs. Buchholz-Hill Transportation Company, Defendant-in-Error. Citation. Charles C. Burlingham, Attorneys for pl.-in-error, 27 William Street, Borough of Manhattan, New York City. Service of within citation is hereby admitted, this 23 day of November, 1912. Armstrong & Brown, Attorneys for def. in error.

206 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Buchholz Hill Transportation Company, plaintiff, and John

F. Baxter, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error *had* happened, to the great damage of the said defendant as is said and appears by its complaint. We being willing that error, if any hath been, should
207 be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 22d day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

208 [Endorsed:] Nov. 27, 1912. Supreme Court of the U. S. John F. Baxter, Plaintiff-in-Error, vs. Buchholz-Hill Transportation Company, Defendant-in-Error. Writ of Error. Charles C. Burlingham, Attorneys for pl.-in-error, 27 William Street, Borough of Manhattan, New York City. Service of within writ of error is hereby admitted, this 23 day of November 1912. Armstrong & Brown, Attorneys for def.-in-error.

209 STATE OF NEW YORK,
County of Nassau, ss:

I, Thomas S. Cheshire, Clerk of the County of Nassau and of the Courts of Record thereof, pursuant to a writ of error directed to the Honorable the Judges of the Supreme Court of the State of New York, which said writ was allowed by the Hon. Charles E. Hughes,

Associate Justice of the Supreme Court of the United States and signed by the clerk of said court on November 22, 1912, do hereby certify the writing hereto attached to be a true, complete and perfect copy of the record and assignment of errors and of all proceedings in the case of Buchholtz-Hill Transportation Company, plaintiff-respondent, against John F. Baxter, defendant-appellant, as fully as the same remain on file and on record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court this 4th day of Dec'r, 1912.

[Official Seal County of Nassau, State of New York.]

THOS. S. CHESHIRE, *Clerk*.

210 [Endorsed:] New York Supreme Court, Nassau County. John F. Baxter, Plaintiff-in-error, against Buchholz-Hill Transportation Company, Defendant-in-error. Return *of* Writ of Error.

Endorsed on cover: File No. 23,457. New York Supreme Court. Term No. 882. John F. Baxter, plaintiff in error, vs. Buchholz Hill Transportation Company. Filed December 13th, 1912. File No. 23,457.

Supreme Court of the United States,

JOHN F. BAXTER,
Plaintiff-in-Error
(Defendant Below),

vs.

BUCHHOLZ-HILL TRANSPORTATION COMPANY,
Defendant-in-Error
(Plaintiff Below).

OCTOBER TERM, 1912.
No. 889.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND AFFIRM.

Statement of Facts.

On February 12th, 1907, the barge "Macy," belonging to the defendant-in-error (hereinafter called the plaintiff), was sunk in the North River (Record, p. 81). Two days later the tug "Hiawatha" ran upon the wreck (Record, p. 14), and for the damages sustained, the owners of the "Hiawatha" libelled the "Macy," alleging the failure of the owners of the "Macy" to fulfill the requirements of the Federal Statute, whereby it became their duty, as owners of the sunken boat, to immediately mark the place where it sunk with a buoy or other suitable beacon (Record, pp. 65–67). The statute will be found quoted in the opinion of the Circuit Court of Appeals (Record, p. 88).

The plaintiff then brought in the plaintiff-in-error (hereinafter called the defendant) by petition under the 59th Rule in Admiralty, alleging a contract with the

defendant whereby defendant was to locate, buoy and raise the wreck of the "Macy" (Record, pp. 69, 70)—in other words, a contract by Baxter to undertake plaintiff's statutory duty as owner of the sunken "Macy."

The District Court sustained the libel against the "Macy" on the ground that the plaintiff, as owner, had failed to comply with the statutory requirement (Record, p. 85), but dismissed the petition to bring in Baxter, but not upon the merits, it being considered that the question of Baxter's liability must be determined in a separate action (Record, p, 74).

The District Judge, however, expressed himself as being of the opinion that defendant did not contract to mark the MACY as required by statute (Record, p. 86).

On appeal by the claimant there, the Circuit Court of Appeals affirmed the decision of the District Court with interest and with costs to Baxter against the "Macy" (Record, p. 89, 91), saying in its opinion that it considered Baxter's recollection of the contract the correct one, viz., that he had agreed merely "to recover the boat" and not to carry out the special statutory obligation imposed on the plaintiff as owner (Record, p. 89).

In its order for mandate, the Circuit Court of Appeals, on application of the plaintiff, the appellant there, stated that the affirmance of the decree of the District Court was without prejudice to the bringing of a new action by Buchholz-Hill Transportation Company against Baxter for the relief prayed for in its petition against Baxter (Record, p. 90), and the final decree of the District Court on the mandate was to this effect (Record, p. 91).

Thereafter the plaintiff brought this action to recover the damages which it had been compelled by the decree of the District Court to pay to the owners of the "Hiawatha." The defendant's plea of *res adjudicata*, based upon the decision of the U. S. Circuit Court of Appeals, was overruled, and judgment rendered in plaintiff's favor, which

was affirmed by the Appellate Division and by the Court of Appeals.

Thereupon this writ of error was sued out upon the ground that the New York courts had refused to give effect to the proceedings in the Federal Courts.

FIRST POINT.

The courts of New York failed to give effect to a right claimed under an authority exercised under the United States, and this Court therefore has jurisdiction of this appeal.

The sole ground of the motion to dismiss is that the court is without jurisdiction, because no Federal question is involved on this appeal.

The defendant pleaded the proceedings in the Circuit Court of Appeals and set them up as a bar to this action (Record, pp. 6, 7). The defendant offered these proceedings in evidence, as will be specifically referred to hereinafter, and excepted to the Trial Court's refusal to admit them in evidence. Indeed plaintiff's attorney does not contend that the Federal question is not properly raised, if one exists.

On the trial the theory of the plaintiff's counsel and of the Trial Court was apparently that the proceedings in the Circuit Court of Appeals were not material to the plaintiff's case. The plaintiff offered in evidence the pleadings and the decree of the United States District Court, and they were received in evidence (Record, pp. 12, 13). He also offered in evidence the notice of appeal and assignment of errors, the order for mandate made by the Circuit Court of Appeals, and the decree of the United States District Court entered upon the mandate; but, upon ob-

jection by the defendant's counsel that the opinion of the Circuit Court of Appeals should be included, the Court excluded the entire record in the Circuit Court of Appeals (Record, p. 13). At the same time the Court said:

> "For the purposes of this case, in so far as the same is presented by the pleadings, the determination in the District Court is sufficient as between the litigating defendants in the District Court action" (Record, p. 13).

It is thus apparent that both plaintiff's counsel and the Court considered it unnecessary to prove what proceedings were taken in the Circuit Court of Appeals. In this they were in error, as has recently been held in *Cahill* v. *Standard Marine Insurance Co.*, 204 N. Y., 190.

In that case the Court said at page 196:

> "It seems to be well settled that on appeal from a decree of the District Court to the Circuit Court of Appeals in such a case as this, the latter court considers all the evidence *de novo* and renders a decree which entirely supplants that of the first court, and, therefore, we are concerned simply with the proceedings of the Circuit Court of Appeals" (*Gilchrist* v. *Chicago Ins. Co.*, 104 Fed. Rep., 566; *Munson S.S. Co.* v. *Miramar S. S. Co.*, 167 Fed. Rep., 960).

Holding this erroneous view of the proceedings in the United States Courts, the Trial Court, when the defendant offered in evidence the record of all the proceedings in both the District Court and the Circuit Court of Appeals, indicated that it would exclude the entire record in the Circuit Court of Appeals (Record, pp. 43, 44). Upon plaintiff's counsel, however, stating that he made no objection to anything except the opinions and testimony, the Court admitted the record of proceedings in both Courts, with the exception of the opinions and the testimony (Record, p. 44). To the Court's exclusion of the latter, the defendant duly excepted (Record, p. 44).

Upon the question of *res judicata*, the Trial Court was of opinion that the recital in the judgment record was conclusive and that nothing outside of that could be shown to sustain the plea, and that as neither the decree of the District Court nor the mandate of the Circuit Court of Appeals showed a dismissal of the plaintiff's petition upon the merits, the plea of *res judicata* must necessarily fail (Record pp. 11, 12). So far as the provision in the mandate—"but without prejudice to the bringing of a new action by appellant against the said John F. Baxter for the relief prayed for in its petition against said Baxter"—was concerned, the Trial Court correctly held that it did not add to or detract at all from the real situation and was of no moment in this case (Record, p. 11).

That parties are not confined to the recitals in the judgment alone, but that proof *aliunde* the record is admissible to show what questions were actually litigated and decided, is the well settled law.

Young v. *Block*, 7 Cranch., 565, 567;
Washington Steam Packet Co. v. *Sickles*, 24 How., 333, 334;
Miles v. *Caldwell*, 2 Wall., 35, 43;
Packet Co. v. *Sickles*, 5 Wall., 580, 591:
Russell v. *Place*, 94 U. S., 606, 608;
Campbell v. *Rankin*, 99 U. S., 261, 263;
Holford v. *James*, 136 Fed. Rep., 553, 555;
Aetna Life Ins. Co. v. *Board of Comm. of Hamilton Co.*, 117 Fed. Rep., 82, 88;
Carlton v. *Lombard, Ayres & Co.*, 149 N. Y., 137, 152;
Clark v. *Scovill*, 198 N. Y., 279;
Doty v. *Brown*, 4 N. Y., 71, 75;
Kerr v. *Hays*, 35 N. Y., 331, 338;
Smith v. *Smith*, 79 N. Y., 634;
Adams v. *Conover*, 87 N. Y., 422, 429.

And that the opinion of the Circuit Court of Appeals in an admiralty suit is admissible to show what was actually decided in that suit has been held in *Cahill* v. *Standard Marine Insurance Co.* (*supra*). In that case the New York Court of Appeals said in reference to the opinion of the Circuit Court of Appeals:

> "It is understood that as a matter of practice the opinion handed down by that court in connection with the decree really serves the purpose of findings, and if that is so, such opinion was, of course, competent evidence to prove the grounds on which the decree had proceeded. It must be that a party will be allowed in some way, when relevant, to show the grounds upon which a court has based its decision, and there was no other competent evidence by which to prove these facts in this case than by the opinion."

This Court has also held that findings of fact are admissible in support of a plea of *res judicata*.

> *Last Chance Mining Co.* vs. *Tyler Mining Co.*, 157 U. S. 683, 690.

None of these propositions are in reality disputed by the plaintiff. In its brief upon this motion it says of the the proceedings in the Circuit Court of Appeals:

> "This was a trial *de novo*, and the Court held that Baxter did not contract to discharge the statutory duty of buoying the boat."
>
> (Defendant-in-Error's Brief, p. 2.)

Both in the Appellate Division and in the Court of Appeals the defendant has admitted that the testimony, opinion and evidence *aliunde* the decree in the Federal Court may be examined to determine what issues were determined.

The New York Court of Appeals in its opinion in this case said:

> "It seems that such an opinion in a Federal Court is deemed equivalent to a decision containing findings

in a State Court (Cahill *v.* Standard Marine Ins. Co., 204 N. Y. 190); and that if in the case under consideration it had been followed by a simple decree of affirmance, the adjudication would have been conclusive against the claim prosecuted by the plaintiff in the present action." (Record, p. 108.)

It follows, therefore, that the opinion of the Circuit Court of Appeals was erroneously excluded, because it would have shown a conclusive adjudication against the plaintiff's claim.

Whether or not the addition by the Circuit Court of Appeals to its decree of affirmance of the words "but without prejudice to the bringing of a new action," etc., destroyed the binding effect of its adjudication or not is the very question which this Court will be called upon to consider.

There is thus presented a federal question for review by this Court, and the motion to dismiss should be denied.

SECOND POINT.

The Motion to affirm should be denied.

The plaintiff moves for the affirmance of the judgment appealed from upon the ground that the appeal is frivolous and taken for delay.

The plaintiff concedes in his brief on this motion that the appeal in the Circuit Court of Appeals was a trial *de novo*, and that the decision of that Court was originally upon the merits (p. 2). But he contends that the insertion of the provision in the mandate of the Circuit Court of Appeals that the affirmance should be "without prejudice to the bringing of a new action . . ." deprives it of its effect as a bar or as an estoppel. It is well settled that if an action has been tried and decided upon the merits, the insertion of such a provision in the judgment does not pre-

vent that judgment from operating as *res judicata* in subsequent litigation between the same parties.

Bostwick v. *Abbott*, 40 Barb., 331.

In that case a judgment had been rendered dismissing the plaintiff's complaint, and the court, upon motion of the plaintiff, directed that the words "without prejudice to the right of the plaintiff to bring another action", be added to the judgment. This was accordingly done. Another action was begun by the same plaintiff against the same defendant, whereupon the defendant pleaded the judgment in the first action as *res judicata*. The trial court sustained the plea, regardless of the provision, "without prejudice", in the judgment.

On appeal the judgment was affirmed, the Court saying at p. 333;

> "It is said that the common pleas modified the judgment in that court by adding to the judgment the words 'without prejudice to the right of the plaintiff to bring another action'; and the plaintiff contends that such addition prevents that judgment from being a bar. I do not assent to that doctrine. If the judgment would have been a bar to the second action, without these words, I am at a loss to see how the addition of them would change the effect of the judgment. That case was tried by the court without a jury. The judge heard the plaintiff's testimony and decided on the merits. Having so decided, he cannot destroy the effect of that decision by giving the plaintiff leave to bring another action. Suppose the case had been before a jury and they had found for the defendant. The court could not qualify the judgment by the addition to the judgment of the words above referred to."

A like conclusion as to the ineffectiveness of such a provision in a judgment was reached in *Prondzinski* v. *Garbutt*, *9 North Dakota, 239*.

The plaintiff argues on page 2 of his brief upon this motion, that although the Circuit Court of Appeals originally decided in favor of Baxter upon the merits, the Court there-

after modified the decree so as to reserve to the plaintiff the right to begin a new action against the defendant. Assuming that this was the purpose of the Circuit Court of Appeals in the case at bar, that Court had no power to reserve the right to the plaintiff to institute another action after it had once decided against him. This is exactly what was done in the case of *Bostwick* v. *Abbott*, *supra*, but without effect. Despite the provision contained in the decree, the proceedings in the Circuit Court of Appeals are conclusive of the rights of the plaintiff and of the defendant.

It is a fundamental principle necessarily binding upon every judicial tribunal, that when evidence tending to establish the claim asserted by the plaintiff has been given upon a trial, and evidence on the part of the defendant tending to controvert the plaintiff's case has been received, and the Court then determines the litigation, such determination must necessarily be upon the merits and conclusive in any subsequent litigation between the parties. However inadequate the Court may consider the presentation of his case by one party or the other, and although the Court may think that the facts could better be determined in a subsequent litigation, it is without power to grant either party a second day in court. Clearly a Court cannot decide a case upon the merits, or not, according to its own views of expediency, and certainly it can not, having once decided a case upon the merits, destroy the effect of its decision as *res judicata* by any provision in its decree that it shall not have that effect.

That there is no particular virtue in the name which a Court may apply to its judgment has been repeatedly determined. In *Deeley* v. *Heintz*, 169 N. Y. 129, the Court said, at page 135:

> "Hence, upon principle and authority, the decision in this case was a judgment upon the merits and not a non-suit. The Trial Court weighed the evidence, determined the intention of the parties and held, not

that the plaintiff had merely failed to prove her case, but that she had affirmatively proved the defendant's case; that after the proofs were all in it was shown from the correspondence and other proof that the defendant never made any warranty of the character or quality of the goods. This was as complete a determination of the controversy as the Court could make under any circumstances, and, of course, the judgment was a bar to any other action for the same cause. When a trial results in such a situation the decision is a judgment on the merits, no matter by what name it may be called. When it appears that the plaintiff produced no proof whatever in support of the case upon which a verdict could be rendered or facts found, then there may be a non-suit, but when both parties give all the proof that they have and they court finds the facts and determines the issues, that is a trial upon the merits and its legal effect cannot be changed by giving to it a wrong name."

In the case of *Elwell* v. *McQueen*, 10 Wend, 520, 524, the Court said:

"The former judgment pleaded in this case, though *called* a judgment of non-suit, was, in judgment of law, a judgment for the defendant on the merits, and should have been held a bar to the present action."

It matters not, therefore, what the Circuit Court of Appeals denominated its dismissal of the petition in its decree, nor what effect it declared should be given to it. The important fact is that the Circuit Court of Appeals did determine the controversy upon the merits and having made such a determination, full effect must be given to that determination.

But, whether or not the proceedings in the Circuit Court of Appeals constitute a bar to this action, that Court conclusively determined that the appellant did not make the contract with the respondent which is the basis of this judgment; that issue of fact is settled as between these parties and cannot again be litigated.

It was the opinion of the District Judge that the defendant did not contract to mark the wreck (Record,

p. 86). The Circuit Court of Appeals, after full consideration of all the testimony on both sides, reached the same conclusion, saying:

> "As to what contract was made between them we have the evidence only of the two individuals who entered into it, Baxter and Hill, the President of the claimant; the latter says it was to 'locate buoy and raise the wreck,' the former that it was 'to recover the boat,' the conversation was through telephone. We are persuaded that Baxter's recollection as to the conversation is the correct one; it certainly is inherently more probable" (Record, p. 89).

Here, then, is an express finding by a court of competent jurisdiction, having jurisdiction of the parties here, and having before it as was expressly stipulated in this case (Record p. 83), substantially the same testimony as that taken upon this trial, that the defendant did not make the contract with the plaintiff, which is the basis of this entire action, and the existence of which was submitted to and found by the jury in this case, and which was essential to any judgment in favor of the plaintiff.

The Court was never asked to reconsider its decision of the disputed fact as to the existence of the contract and it has never in any way altered the finding contained in its opinion, that Baxter did not agree to mark the Hiawatha. That finding cannot now be controverted by the parties to that suit. Upon this point the authorities are clear.

In *Dobson* v. *Pearce*, 12 N. Y. 156, the Court held that although the decree of a Connecticut Court enjoining the enforcement of a New York judgment was not a bar to an action here upon the judgment, yet as to the *facts* determined by the Connecticut Court of Chancery—that the New York judgment had been obtained by a fraud—it was conclusive in the action then before the Court.

In *White* v. *Coatsworth*, 6 N. Y., 137, it was held that the verdict of a jury in summary proceedings that no rent was due, was conclusive in a second action between the

same parties, brought to replevy goods distrained for non-payment of the same rent in question in the summary proceedings. The Court said at page 139:

> "It is an established maxim, that no one ought to be twice vexed for the same cause. The judgment of a court of competent jurisdiction upon a point litigated between the parties is conclusive in all subsequent controversies where the same matter comes again directly in question."

In the case of *Carson* v. *Three States Lumber Company*, 149 Fed. Rep., 377, it appeared that the plaintiffs had previously brought a suit in equity asserting title to timber, rights in which they had theretofore conveyed to the defendant, on the ground that the defendant had not cut the timber within a reasonable length of time. They prayed for an injunction restraining the defendant from cutting and removing the timber, and further prayed that should they be mistaken as to whether the defendant had had a reasonable time to remove the timber, the Court would determine what would be a reasonable time. The Appellate Court reversed a decree in favor of the plaintiffs and decreed the dismissal of the plaintiffs' bill. In its opinion, the Court concluded that a period of ten (10) years from November 1, 1893, constituted a reasonable time for the removal of the timber.

Subsequently, the plaintiffs brought suit to recover for timber cut and removed prior to November 1, 1903, but the Court held that the prior adjudication that the defendant have until 1903 to remove the timber was binding upon the parties, even though the decision fixing the reasonable time was contained only in the Court's opinion and not in its decree.

The findings of a court of competent jurisdiction, after a hearing upon the merits, are conclusive upon the parties as to the facts so found, even though a final judgment upon the merits of the controversy is not entered upon those findings. *Munson* v. *Munson*, 30 Conn. 425.

In that case the plaintiff brought ejectment and the defendants offered evidence to show that the grantor under whose deed plaintiff claimed was incompetent and in charge of an overseer when he made the deed. The plaintiff offered evidence of an earlier suit in chancery between himself and the defendants, in which the Court had referred this issue as to the grantor's competency to a committee, which had decided that the grantor was competent. The Court of Chancery, however, had made no determination upon the merits, but had dismissed the bill on the ground that the petitioner had an adequate remedy at law. The defendants contended that for this reason they were not bound by the findings. The Court held the prior adjudication conclusive as to the grantor's competency.

In *Huntley* v. *Holt*, 59 Conn. 102, suit was brought to recover a debt for the construction of certain buildings. In a former suit to foreclose a lien on those buildings, the Court had found that the defendant was indebted to the plaintiff but that the defendant had no interest in the buildings and so dismissed the proceedings. It was held that the record of the earlier suit was properly admitted to show the indebtedness of the defendant to the plaintiff.

Under these authorities the defendant was entitled to show that the issue of fact between himself and the plaintiff had been conclusively and for all time determined in his favor. Such a determination he could have shown by the Record on Appeal and the opinion of the Circuit Court of Appeals. This evidence would have been conclusive that Baxter never agreed to mark the "Macy." Yet through some mistaken theory that the recitals of the decree were the only competent evidence to establish *res judicata*, this evidence was excluded.

The Court of Appeals said in its opinion:

> "The insertion of the provision in the decree limiting its effect so far as Baxter is concerned is equally consistent with a conclusion on the part of the Cir-

> cuit Court that the judges had not heard this branch of the case fully enough to be able to decide it justly and, therefore, preferred to leave it open for future adjudication." (Record, p. 109.)

But the Circuit Court of Appeals did hear the case sufficiently to enable it to reach a decision. It did decide the suit, holding that Baxter had not contracted to mark the wreck. While that Court attempted to give the plaintiff permission to institute a new action, it never changed or modified its decision in regard to the issues presented to it. It merely attempted to limit the effect of its decree in other proceedings over which it would have no jurisdiction, and this it could not do.

The opinion of the Court of Appeals continues:

> "At all events they chose thus to restrict the operation of their judgment; it is plain that they did this intentionally and with careful consideration; and the courts of this State ought not to give to the decree of a Federal Court an effect as a former adjudication which would be denied to such decree by the Federal courts themselves."

It is plain that the Court of Appeals considered not what effect should be given to this decree under the decisions of the Federal courts, but rather what effect would have been given to it by the judges of the Circuit Court of Appeals who authorized the provision in the mandate. That was not the proper criterion for determining the effect to which this decree was entitled in the State courts. The proper test is—what is the effect of this decree under the decisions of the courts of the United States; not what effect would be given it by the judges who made it.

It is clear that in the case of *Bostwick* vs. *Abbott* (*supra*), the trial court which inserted the provision, "without prejudice," in the judgment in that case, would have given to that judgment no effect as *res judicata*, but it was rightly held, nevertheless, that the judgment was a bar to any subsequent litigation between the same parties. That judgment would have been a bar in the Federal

Courts as well as in the courts of the state. And had that judgment been rendered in a court of the United States, can it be doubted that the courts of New York would have been required to hold that judgment a bar?

The Court of Appeals in its opinion (Record, p. 109), remarked upon the phraseology of decrees in equity dismissing bills without prejudice, and it cited several cases. In all of those cases in which the Courts had overruled the defense of *res adjudicata*, there had been no prior decision between the same parties and upon the same issues. Thus in *O'Keefe* v. *Irvington Co.*, 87 Md., 196, the first bill was brought for specific performance of a contract; while in the second bill reformation of the contract was sought. In *Hazen* v. *Lyndonville Bank*, 70 Vermont, 543, the parties were different in the second proceeding. In *Thurston* v. *Thurston*, 97 Mass., 39, the decree was held a bar. In the case of *Northern Pac. R. Co.* v. *St. Paul, etc., Ry. Co.*, 47 Fed. Rep., 536, there was no evidence that there had ever been a prior consideration of the issue upon the merits, and the question before the Court was merely one of the interpretation of the decree. It does not appear that there was any evidence *aliunde* offered to show a decision upon the merits. That it could be shown that there had been a prior decision upon the merits, if that was the fact, regardless of the form of the decree, seems to have been the view of the Court, for, after referring to the dismissal without prejudice, it says:

> "The decree or order of dismissal is not presumed to have been rendered on the merits."

All the decrees without prejudice that the Court of Appeals considered were decrees in equity; but the Court seems to have thought that such decrees and the decree in the case at bar were similar to nonsuits in a common law action. Quite the contrary is true of the decree in this case. The petition against Baxter in this suit was not dismissed for any failure of proof, or for any techni-

cal defect. The petition was dismissed for the sole reason that the evidence showed that the defendant did not make the contract that the plaintiff alleged. It was a decision upon the merits—not a nonsuit.

The defendant has in good faith claimed rights under proceedings in a Federal Court, and these rights have been denied him by the State Courts. Whatever this Court may, after a full discussion of the matter, hold the law to be, it is clear that the defendant is entitled to question in this Court whether the State Court has given the requisite effect to the proceedings in the Federal Courts, and this appeal is clearly within the jurisdiction of this Court.

The motion to dismiss is wholly without color of right. And it is well settled that this Court will not entertain a motion to affirm unless there is at least some color of right to dismissal.

Whitney v. *Cook*, 39 U. S. 607;
Hinckley v. *Morton*, 103 U. S. 764;
School District of Ackley v. *Hall*, 106 U. S. 428;
Danes v. *Corbin*, 113 U. J. 657, 689.
New Orleans v. *Louisiana Construction Co.*, 129 U. S. 45, 47.

LAST POINT.

The motion to dismiss and affirm should be denied.

CHARLES C. BURLINGHAM,
Attorney for Plaintiff-in-Error,
27 William Street,
New York City.

NORMAN B. BEECHER,
RAY ROOD ALLEN,
Of Counsel.

Supreme Court of the United States

JOHN F. BAXTER, Plaintiff-in-Error, against BUCHHOLZ-HILL TRANSPORTATION COMPANY, Defendant-in-Error.	October Term—1912. No. 882.

To Counsel for Appellant:

PLEASE TAKE NOTICE, that on the 27th day of January, 1913, at the opening of the Court, or as soon thereafter as counsel can be heard the motion, of which the attached is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Dated, January 4th, 1913.

Yours, &c.,

ARTHUR ENGLISH,
Counsel for Defendant-in-Error
for the Purposes of the Motion.

SUPREME COURT OF THE UNITED STATES.

JOHN F. BAXTER, Plaintiff-in-Error, against BUCHHOLZ-HILL TRANSPORTATION COMPANY, Defendant-in-Error.	October Term—1912. No. 882.

Comes now the defendant-in-error, by Arthur English, its counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction because the judgment of the Supreme Court of the State of New York, entered upon the determination of the Court of Appeals of that State is not against the validity of the decrees of the United States District and Circuit Court of Appeals, but is in affirmance thereof.

And because said appeal is frivolous in that the sole contention urged by the plaintiff-in-error is that the mandate and decree of the Circuit Court of Appeals at pages 90 and 91 of the record, is a bar to this suit; and that by inspection it is apparent that said decree is not such a bar, an inspection of page 60 of the record disclosing that said Circuit Court of Appeals modified its decision before the same became merged in the mandate and decree.

And the said defendant-in-error, by counsel as aforesaid, also moves the Court to affirm the said judgment because of which the said writ was issued, because it is manifest that the said appeal was taken for delay only.

ARTHUR ENGLISH,
Counsel for Defendant-in-Error
for the Purposes of these Motions.

(23,457)

Supreme Court of the United States

JOHN F. BAXTER, Plaintiff-in-Error, against BUCHHOLZ-HILL TRANSPORTATION COMPANY, Defendant-in-Error.	October Term, 1912. No. 882.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND AFFIRM.

Statement of Facts.

The Buchholz Company, defendant-in-error, had lost one of its barges in the North River and hired Baxter to locate, buoy and raise the wreck, as required by the Federal Statutes. Baxter neglected this contract obligation and the result was the tug Hiawatha, belonging to one Edgerton, ran on the unbuoyed wreck and foundered.

The owner of the Hiawatha thereupon filed his libel against the Buchholz Company's vessel, and the latter company thereupon filed a petition un-

der the 59th Rule, asking that Baxter be made a defendant and adjudged to be ultimately liable.

Early in the trial of the case in the District Court before Judge Adams, the Court held that Baxter was improperly brought in under the 59th Rule, and that the Buchholz Company's remedy against him lay in a separate suit. Thereupon he dismissed the petition against Baxter, without prejudice to the beginning of a new suit. Page 74 of the record, the decree reads: "That said petition of the Buchholz-Hill Transportation Company, filed under the 59th Rule of Admiralty to have John J. Baxter brought into this suit, etc., should be dismissed, but not upon the merits, it being considered that the question of liability of the said John F. Baxter must be determined in a separate action, and the said dismissal to be without prejudice to another action."

Thereupon the Buchholz Company appealed to the Circuit Court of Appeals. This was a trial de novo and the Court held that Baxter did not contract to discharge the statutory duty of buoying the boat.

If the Court had not modified this, a judgment would have entered as a matter of course, dismissing the petition against Baxter upon the merits, and that would have ended the controversy; but before the decree passed upon this decision, an application was made to the Circuit Court of Appeals by the Buchholz Company to modify the decision, so that the decree entered thereon should provide that the right was reserved to the Buchholz Company to begin a separate suit against Baxter. It was pointed out to the Court that the Buchholz Company should have the right to a trial of the question as to whether Baxter had not as-

sumed to discharge this statutory duty of buoying in a forum that would hear the witnesses and weigh the evidence. Manifestly, it had not had such a trial in the District Court, because the judge had ruled that Baxter was not a proper party, and in the Circuit Court of Appeals the trial was upon a printed record. The application that was made to the Court appears on page 60 of the record.

It was opposed by Baxter, who asked the Court to pass a decree upon the merits. The Court granted the application of the Buchholz Company, and the result was the issuance of the mandate, found at page 90 of the record, affirming the decree below. "But without prejudice to the bringing of a new action by the Buchholz-Hill Transportation Company against said John F. Baxter for the relief prayed for in its petition against said Baxter."

The decree entered upon this mandate, found at page 91, reads the same way.

Thereupon the Buchholz Company brought this action. This opinion and decision of the Circuit Court of Appeals was urged as a bar to the suit; but the Supreme Court of New York, the Appellate Division and the Court of Appeals have held, without dissent, that this judgment is manifestly not a bar.

Thereupon Baxter sued out this writ of error to the Supreme Court of New York.

The above facts speak for themselves. Manifestly, the decree that is presented as a bar, is not a bar, as a mere inspection thereof will reveal, and granting the fact that the Court may consider that the opinion which precedes the judgment overrules it, a mere reading of page 60 of this record shows that the Court modified its conclusion.

The defendant-in-error has not, nor cannot, point to any authority establishing that a Court cannot modify its decision.

It may be safely admitted that if a Court has decided the question of fact upon the merits and does not change its mind, it cannot arbitrarily grant a trial of that question. But that is not the case here.

This Court changed its decision, and its mandate and decree followed.

Counsel respectfully submits that a mere reading of page 60 of this record effectually disposes of this case.

Thirteen judges have unanimously held that this decree is not a bar, and this is so palpably true, the conclusion is irresistible that this writ of error was sued out for delay, and the motion to dismiss and affirm should be granted.

THIS COURT HAS NO JURISDICTION OF THE CASE.

The plaintiff-in-error set up in his answer in the suit in the State Court as a bar to said suit (page 7, record) that the decrees of the United States District Court and of the United States Circuit Court of Appeals ought to be a bar to this action, because they should have been in form upon the merits against this defendant-in-error, and ought not to have permitted the defeated party leave to sue over.

An inspection of these decrees, page 74 and pages 90 and 91, shows that they were *not* upon the merits, but expressly gave the right to plaintiff-in-error to begin this action. The judgment of the State Court is, therefore, not against the validity of the

Federal Court decrees, but in express compliance therewith.

If these decrees were wrong, the remedy of plaintiff-in-error was to apply to the Court to correct them or to appeal. It makes no difference in this Court whether the decrees were right or wrong, as the jurisdiction of this Court exists only when the State Courts have failed to give *effect* to the terms of the Federal judgment.

Murdock vs. Mayor, &c., of Memphis, 20 Wall., 590.

Some remarks in the opinion of the United States Circuit Court of Appeals may have been in the first instance against the defendant-in-error upon the merits, but an opinion cannot form the basis of a plea of res judicata.

But, even giving to the remarks in this opinion such vitality as to override, the subsequent decree, page 60 of the Record, shows that the Court on notice and due application changed its conclusion and the decree followed such change.

The State Court having, in fact followed the Federal judgment, whether right or wrong, this Court is without jurisdiction.

The motion to dismiss, etc., should be granted, both for lack of jurisdiction and for the reason that the appeal is frivolous and taken for delay.

Respectfully submitted,

ARTHUR ENGLISH,
Counsel for Defendant-in-Error,
27 Cedar Street,
New York City.